

IN THE SUPREME COURT
OF THE DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA

In the matter of an Application
under and in terms of Article 126 (2) of
the Constitution of the Republic of Sri
Lanka.

DON KARUNASENA ATHUKORALA
Batuwatte Mawatha,
Hapugala
Wakwella.

PETITIONER

S.C. F.R. No. 232/2012

VS.

- 1. H.M.GUNASEKERA**
Secretary,
Ministry of Education,
Isurupaya, Batraramulla.
- 1A. W.M.BANDUSENA,**
Secretary,
Ministry of Education,
Isurupaya, Battaramulla.
- 2. RADHA NANAYAKKARA,**
Additional Secretary,
Ministry of Education,
Isurupaya, Battaramulla.
- 3. P.B.ABEYKOON**
Secretary, Ministry of Public
Administration and Home
Affairs, Independence Square,
Colombo 7.
- 3A. J. DADALLAGE,**
Secretary, Ministry of Public
Administration and Home
Affairs, Independence Square,
Colombo 7.

4. **DAYASIRI FERNANDO**
Chairman,
- 4A. **DHARMASENA DISSANAYAKE**
Chairman,
5. **PALITHA M. KUMARASINGHE**
Member,
- 5A. **A.SALAM ABDUL WAID**
Member,
6. **S.C.MANNAMPERUMA**
Member,
- 6A. **MS. D.SHIRANTHA
WIJEYATHILAKA**
Member,
7. **ANANDA SENEVIRATNE**
Member,
- 7A. **DR. PRADEEP RAMUNUGAM**
Member,
8. **N.H.PATHIRANA**
Member,
- 8A. **MRS. V. JEGARAJASINGHAM**
Member,
9. **S. THILLAI NADARAJA**
Member,
- 9A. **SANTI NIHAL SENEVIRATNE**
Member,
10. **M.D.W.ARIYAWANSHA**
Member,
- 10A. **S.RANNUGE**
Member,

- 11. A.MOHAMED NAHIYA**
Member,
- 11A. D.C.MENDIS**
Member,
- 12. SIRIMAVO A.WIJERATNE**
Member,
- 12A. SARATH JAYATHILAKA**
Member,

The 3rd to 11th Respondents and presently, the 4A to 12A Respondents, all of Public Service Commission No. 177, Nawala Road, Narahenpita, Colombo 5.

- 13. T.M.L.C.SENEVIRATNE**
Secretary,
Public Service Commission,
No. 177, Nawala Road,
Narahenpita,
Colombo 5.
- 13A. H.M.G.SENEVIRATNE**
Secretary,
Public Service Commission,
No. 177, Nawala Road,
Narahenpita, Colombo 5.
- 14. PROVINCIAL DIRECTOR
OF EDUCATION,
(Southern Province),**
Provincial Educational
Department, Galle.
- 15. K.A.TILAKARATNE**
Director General of Pensions,
Department of Pensions,
Maligawatte,
- 15A. S.S.HETTIARACHCHI**

Director General of Pensions,
Department of Pensions,
Maligawatte,
16. HON. ATTORNEY GENERAL
Attorney General's Department,
Colombo 12.

RESPONDENTS

BEFORE: B.P. Aluwihare, PC. J
Priyantha Jayawardena, PC.J
Prasanna Jayawardena, PC.J

COUNSEL: J.C. Weliamuna with Senura Abeywardena for the Petitioner
Rajitha Perera, SSC, for 1A, 2, 3A, 4A, 5A, 6A,7A, 8A, 9A,
10A,11A, 12A,13A,14,15A and 16th Respondents.

ARGUED ON: 05th July 2016.

WRITTEN SUBMISSIONS FILED: By Petitioner on 10th August 2016.
By Respondents on 08th August 2016.

DECIDED ON: 28th October 2016

Prasanna Jayawardena, PC, J.

The Petitioner joined the Public Service in 1969, as an Assistant Teacher. He first completed a Teacher Training Course at the Maharagama Teacher Training College and was then appointed to the 'Sri Lanka Education Service', which was later renamed the 'Sri Lanka Educational Administrative Service'.

During his period of service, the Petitioner taught in 11 schools in different parts of the country and served in administrative capacities in the Zonal Educational Office in Kegalle and the Provincial Educational Department of the Southern Province. The

Petitioner steadily rose through the ranks of the Sri Lanka Educational Administrative Service. He reached the apex of his career in 1996, when he was appointed Principal of the prestigious Mahinda College, Galle which was founded in 1892 under the auspices of the Buddhist Theosophical Society, then led by Colonel Henry Steel Olcott.

About eight years into his tenure as Principal of this College, the Petitioner was arrested by the officers of the Commission to Investigate Allegations of Bribery or Corruption. The arrest was on 24th September 2004. He was suspected of acquiring wealth by corrupt means. A month later, the Petitioner was indicted in the High Court of Colombo under Section 23 A of the Bribery Act No. 8 of 1973. Section 23 A makes it an Offence to own or to have owned property which is deemed under the provisions of Section 23A of the Act, to be property acquired by bribery or to be property acquired by the conversion of property which was acquired by bribery.

At this point, it should be recorded that, at the end of the Trial in the High Court, on 30th September 2010, the Petitioner was acquitted when the learned High Court Judge held that, the Charge had not been proved beyond reasonable doubt. As will be evident later on in this Judgment, the acquittal has no bearing on the present Application. But, to be fair by the Petitioner, the fact of the acquittal must be stated here.

Inevitably, the arrest and indictment of the Petitioner, who was a public officer, resulted in Disciplinary Action being taken against him. This included placing the Petitioner on Compulsory Leave, later interdicting him, the issue of a Charge Sheet and Amended Charge Sheet and the holding of a Disciplinary Inquiry.

Being a public officer, the Petitioner was governed by the provisions of the Establishments Code. Chapter XLVIII of Vol. II of the Establishments Code sets out the Disciplinary Procedure which was applicable to the Petitioner. [All references to Sections in the Establishments Code from here onwards in this Judgment, are references to Sections within the said Chapter XLVIII of Vol. II of the Establishments Code.]

It should also be stated here that, as evident from Section 2:2 read with Section 1:1:1 of the Establishments Code, the `Disciplinary Authority' vested with the power of dismissal and disciplinary control of the Petitioner, was the Public Service Commission.

Following the arrest of the Petitioner, the Public Service Commission directed that, the Petitioner be placed on Compulsory Leave from 08th October 2004 onwards. Thereafter, following his indictment in the High Court, the Petitioner was interdicted on 08th February 2005, in terms of Section 31:1 read with Section 31:1:4 of the Establishments Code.

As evident from the facts stated above, the Trial in the High Court spanned more than five years. During the time the Trial was underway, the Petitioner reached his compulsory retirement age of 60 years, on 03rd October 2007. Therefore, on that day, the Petitioner retired from Service.

A few months before the Petitioner retired, the Petitioner was served a Charge Sheet dated 23rd February 2007 filed with the Petition marked “**P-9a**”, which was issued by the Public Service Commission. This was amended by an Amended Charge Sheet dated 24th August 2009 filed with the Petition marked “**P-9b**”, which was stated to be amended in terms of Section 14:6 of the Establishments Code. There were eighteen Charges which covered a gamut of acts of misconduct alleged to have been committed by the Petitioner during his tenure as Principal of Mahinda College.

Thus, at the time the Petitioner retired, disciplinary proceeding had commenced against him and he was under interdiction.

Section 36:2 of the Establishments Code stipulates that, in such circumstances, the Petitioner retired subject to the provisions of Section 12 of the Minutes on Pensions. In Paragraph [9] of his Petition, the Petitioner has admitted this and stated “.... *The Petitioner retired from Public Service, subject to Section 12 of the Minute on Pensions*”.

In Paragraph [11] of his Petition, the Petitioner states that, “*a formal disciplinary inquiry was conducted against him*”. In his Petition, the Petitioner has not complained regarding the manner in which the disciplinary inquiry was held. I also note that, Section 36:5 of the Establishments Code states that, although the Petitioner had retired by then, the Petitioner was “*bound to participate*” in this disciplinary inquiry. For these reasons, I am not inclined to take into account the Petitioners’ submission, made for the first time in his written submissions tendered on 10th August 2016, that he was not given an opportunity to defend himself at the disciplinary inquiry or to cross examine the witnesses.

The disciplinary inquiry was concluded some years after the Petitioner has retired on 03rd October 2007. The Petitioner was found to be guilty of nine of the eighteen Charges.

The Petitioner states that, thereafter, he received a copy of a letter dated 16th November 2011 sent by the Public Service Commission to the 3rd Respondent [the Secretary, Ministry of Public Administration and Home Affairs], which is filed with the Petition marked “**P10**”. By this letter, the Public Service Commission had recommended to the 3rd Respondent that, in consequence of the Petitioner having been found guilty of nine Charges, a deduction of 25% of the Petitioner’s Gratuity be made. The Public Service Commission goes on to state in this letter that, it is forwarding copies of the Charge

Sheet and Amended Charge Sheet, the Petitioner's reply thereto, the letter advising the Petitioner that he is deemed to have retired, the inquiring officer's Report and the recommendation made by the Ministry of Education. The Public Service Commission states that, these documents are being forwarded to enable the 3rd Respondent to take action under and in terms of Section 36:7 of the Establishments Code.

The Petitioner next states that, on or about 09th April 2012, he received a copy of a letter dated 30th March 2012 sent by the Additional Secretary, Ministry of Education to the Provincial Director of Education (Southern Province), which is filed with the Petition marked "**P11**", stating that:

- (i) The **3rd Respondent** had directed the imposition of a deduction of 25% in the gratuity payable to the Petitioner;
- (ii) The **3rd Respondent** had directed the imposition of a deduction of 10% in the pension payable to the Petitioner;
- (iii) The **Public Service Commission** had directed the payment of only half wages to the Petitioner in respect of the period from the date he was interdicted up to the date he was retired.

The Petitioner does not dispute the validity of the direction that a deduction of 25% be made on the gratuity payable to the Petitioner. In fact, in Paragraph 1.3 (a) of his Written Submissions, the Petitioner has expressly submitted that he accepted this deduction, which is set out in (i) above.

However, firstly, the Petitioner contends that, the 3rd Respondent had no lawful authority to impose a deduction of 10% in the pension payable to the Petitioner or to impose any deduction in excess of the deduction of 25% of the gratuity which was recommended by the Public Service Commission - *ie*: the Petitioner impugns (ii) above. He, secondly, contends that, the decision to pay only half wages to the Petitioner during the period of interdiction was contrary to the provisions of the Establishments Code and is illegal and unreasonable - *ie*: the Petitioner also impugns (iii) above.

By this Application, the Petitioner pleads that, the aforesaid two decisions are in excess of the powers of the 1st, 2nd and 3rd Respondents. The Petitioner states that, these two decisions are unfair, arbitrary, unreasonable, unlawful, excessive and disproportionate. On this basis, the Petitioner alleges that the two impugned decisions violate the fundamental rights of the Petitioner guaranteed under Article 12 (1) of the Constitution.

The Petitioner, prays, *inter alia*, for Orders from this Court directing that, he be paid his monthly pension without any deduction and that, he be paid full wages in respect of the period of interdiction.

On 22nd May 2012, this Court granted the Petitioner leave to proceed in respect of the alleged violation of Article 12 (1) of the Constitution.

The 3rd Respondent – namely, the Secretary, Ministry of Public Administration and Home Affairs – and the 4th Respondent – namely, the Chairman of the Public Service Commission – have filed Affidavits by way of their Objections to the Petitioner's Application.

The Respondents have taken up a preliminary objection basis that, the Petitioner's Application is time barred.

With regard to the merits of the Petitioner's Application, the Respondents state that, under and in terms of Section 12 (2) of the Minutes on Pensions, the Public Service Commission has no authority to make a decision with regard to the pension and gratuity payable to the Petitioner. The Respondents state that, the Public Service Commission may only make a recommendation to the 3rd Respondent who is vested with the authority to take a final decision with regard to the payment of a pension and gratuity to the Petitioner. In this connection, the Respondents also state that, while the 'Disciplinary Authority' vested with the powers of dismissal and disciplinary control of the Petitioner is the Public Service Commission, a decision to withhold or reduce the payment of pension and gratuity under and in terms of Section 12.2 of the Minutes on Pensions is not a "Disciplinary Order" which falls within the province of the Public Service Commission.

The Respondents state that, accordingly, the Public Service Commission, by its letter marked "**P10**", made its recommendation to the 3rd Respondent, under and in terms of Section 36:7 of the Establishments Code, that a deduction of 25% be imposed on the gratuity payable to the Petitioner. This recommendation was considered by a Committee appointed by the 3rd Respondent. This Committee had made the Report filed with the 3rd Respondent's Affidavit marked "**3R-2**". By this Report, the Committee had recommended that, *in addition* to the deduction of 25% of gratuity recommended by the Public Service Commission a deduction of 10% be made in the pension payable to the Petitioner. The Committee has given reasons for its recommendation.

The 3rd Respondent has stated that he agreed with the recommendation of the Committee. Therefore, he had sent the letter dated 15th February 2012 filed with the 3rd Respondent's Affidavit marked "**3R-3**", directing the Secretary, Ministry of Education to effect a deduction of 25% of the gratuity payable to the Petitioner (which had been

recommended by the Public Service Commission) and to *also* effect a deduction of 10% in the pension payable to the Petitioner. This letter bears a notation that a copy was to be sent to the Petitioner.

It is clear that, upon receipt of this letter marked “**3R-3**”, the Additional Secretary, Ministry of Education sent the aforesaid letter dated 30th March 2012 filed with the Petition marked “**P11**” to the Provincial Director of Education (Southern Province) setting out the aforesaid three decisions.

It should be mentioned that, this letter marked “**P11**” refers to a letter dated 15th March 2012 sent by the 3rd Respondent to the Ministry of Education. This date is a typographical error and should read “15th February 2012” – *ie*: the date of the aforesaid letter marked “**3R-3**”. This is confirmed by the fact that the Reference No. PH/P/2/1415 stated in the letter marked “**P11**” with regard to the letter received by the Ministry of Education, is the Reference Number of the aforesaid letter marked “**3R-3**”.

With regard to the payment of half wages to the Petitioner in respect of the period of interdiction, the Respondents state that, the decision to pay half wages was taken by the Public Service Commission on 06th February 2012. This decision had been communicated to the Secretary, Ministry of Education by the Public Service Commission’s letter dated 06th January 2012 filed with Affidavit of the Chairman of the Public Service Commission, marked “**4R3**”. This letter also bears a notation that a copy was to be sent to the Petitioner.

I have set out the relevant facts and also, briefly, set out the positions taken by the Petitioner and the Respondents.

I will now consider the preliminary objection raised by the Respondents that, the Petitioner’s Application is time barred.

As set out in paragraph [12] (a) of the Petition, the Petitioner states that, he first became aware of the impugned decisions only when he received a copy of the letter dated 30th March 2012 filed with the Petition marked “**P11**” which, *inter alia*, sets out these two decisions.

That copy appears to have been sent by ordinary post and was sent by the Ministry of Education, which has its Office in Battaramulla in the Colombo District. The Petitioner resides in Wakwella, which is in the Galle District. In these circumstances, it is entirely possible that, this letter which is dated 30th March 2012 and would have been posted thereafter, reached the Petitioner on or about 09th April 2012, as stated by the Petitioner. Accordingly, this Court has no reason to disbelieve the Petitioner’s statement that he received the letter marked “**P11**” on or about 09th April 2012.

It is long established Law that, the time limit of one month granted by Article 126 (2) of the Constitution will begin to run only from the date the Petitioner became aware or reasonably should have been aware of the alleged violation of his fundamental rights – *vide*: **SIRIWARDENE vs. RODRIGO** [1986 1 SLR 384]. In this Application, on the strength of the averments in the Petition, that date would be 09th April 2012.

The Petitioner has filed this Application on 04th May 2012 and has, therefore, invoked the jurisdiction of this Court within the time limit of one month stipulated in Article 126 (2) of the Constitution.

However, the Respondents contend that, in fact, the Petitioner became aware of the decisions to pay him only half wages during the period of interdiction and to impose a deduction 10% of the pension payable to him, long before 09th April 2012. The Respondents state that the Petitioner had this knowledge from the time the Petitioner received copies of the letters dated 06th February 2012 and 15th February 2012 filed with the 3rd Respondent's Affidavit marked "**3R-4**" and "**3R-3**" respectively, which state these two decisions which are now impugned in the present Application.

If the Petitioner did receive copies of these two letters marked "**3R-4**" and "**3R-3**", he would have been aware of the disputed decisions from the time of he received the copies of the letters. In view of the dates of these two letters, if the Petitioner did receive copies, it can be assumed that, this would have taken place sometime in the month of February 2012.

Therefore, if this Court is satisfied that, the Petitioner did receive copies of these two letters marked "**3R-4**" and "**3R-3**", the Petitioner's Application filed on 04th May 2012 will be time barred and must be dismissed.

In paragraph [12] (b) of the Petition, the Petitioner has stated he did not receive a copy of the letter referred to in the letter marked "**P11**". As I mentioned earlier, that is the letter marked "**3R-3**". Therefore, the Petitioner has denied receiving a copy of the letter marked "**3R-3**".

In his Affidavit, the 3rd Respondent, who wrote this letter marked "**3R-3**", has only stated that this letter was copied to the Petitioner and that "*the Petitioner ought to have known of the decision on or around that date*". The 3rd Respondent does not state that, he believes the Petitioner *did* receive a copy of the letter marked "**3R-3**". The copy said to have been sent to the Petitioner has not been sent by Registered Post.

In these circumstances, this Court cannot be satisfied that, the Petitioner did receive a copy of the letter marked "**3R-3**".

Next, the letter marked “**3R-4**” has been sent by the Public Service Commission. Although this letter bears a notation that a copy was to be sent to the Petitioner, the Affidavit of the Chairman of the Public Service Commission does not state that, a copy was sent to the Petitioner or that, the Chairman believes the Petitioner did receive a copy of the letter.

In these circumstances, this Court also cannot be satisfied that, the Petitioner did receive a copy of the letter marked “**3R-4**”.

Learned Senior State Counsel for the Respondents has submitted that, *“the non-filing of a Counter affidavit by the Petitioner would deem to be an admission of the facts set out in the Objections of the Respondents”* and constitutes an admission by the Petitioner that he has received copies of the two letters marked “**3R-4**” and “**3R-3**”.

However, in the absence of any provision in the Supreme Court Rules, 1990 which stipulates that, a failure on the part of a Petitioner in an Application under Article 126 of the Constitution to deny a statement in a Counter Affidavit that may be filed by the Respondent will amount to an admission of that statement, I do not consider that such a standard of strict pleadings, can be applied. In any event, as I mentioned earlier, the Petitioner has expressly denied having received the letter marked “**3R-3**” and the sender of the letter marked “**3R-4**” has not stated that a copy was sent to the Petitioner.

In these circumstances, I hold that, the Respondents have not established that, the Petitioner received copies of the two letters marked “**3R-4**” and “**3R-3**” or that, the Petitioner was aware the impugned decisions prior to the letter marked “**P11**” which the Petitioner admits having received on or about 09th April 2012.

Accordingly, the preliminary objection is overruled.

I will now consider the merits of the Petitioner’s Application.

As mentioned earlier, the Petitioner claims that, the following two decisions violate his fundamental rights:

- (i) The decision to pay only half wages to the Petitioner during the period of interdiction.
- (ii) The decision to impose a deduction of 10% in the pension payable to the Petitioner;

I will first consider the Petitioner’s contention that, the decision to pay only half wages to him during the period of interdiction violated his fundamental rights under Article 12 (1) of the Constitution.

In Paragraphs [13] (c), [14] (c) and 14 (d) of his Petition, the Petitioner states that, this decision to pay half wages to the Petitioner during the period of interdiction was contrary to the provisions of the Establishments Code and is illegal and unreasonable. The Petitioner does not dispute that the interdiction was justified. He only disputes the decision to pay half wages during his interdiction.

The payment of half wages related to the period of interdiction. That was during the period of the Petitioner's service as a public officer and prior to his retirement. As mentioned earlier, during the period of the Petitioner's service as a public officer, the Disciplinary Authority in respect of the Petitioner, was the Public Service Commission.

The letter marked "3R-4" written by the Public Service Commission makes it clear that, the aforesaid decision was taken by the Public Service Commission. The fact that, the Public Service Commission took this decision is also made clear by the letter marked "P11" which was produced by the Petitioner. Therefore, it is clear that, the decision to pay half wages was taken by the appropriate Disciplinary Authority.

The remaining questions are whether, in the circumstances of this case, the Public Service Commission (as the Disciplinary Authority) had the authority to decide to pay only half wages during the period of interdiction and, if so, whether such decision was reasonable.

The provisions applicable to the interdiction of a public officer are set out in Section 31:1 to Section 31:17 of the Establishments Code. In terms of Section 31:10, the Disciplinary Authority has the authority to decide to not pay a public officer who is under interdiction, any of the emoluments of his substantive post or to pay him one half of such emoluments during the period of interdiction. Section 31:11 read with Section 31:11:1 and Section 31:11:2 prohibits the payment of any emoluments to a public officer during the period of his interdiction if legal proceedings had been instituted against him for a terrorist offence or anti-government activities or a criminal offence or "*an offence of bribery or corruption or fraud*" or where misappropriation of a serious nature of public funds and property has been committed etc. Section 31:12 stipulates that, in other cases, the Disciplinary Authority may decide either to not pay the emoluments or to pay one-half of the emoluments in consideration of the seriousness of the charge, prior record of service of the officer, his financial needs etc.

Thus, it is very clear that, the Public Service Commission (as the Disciplinary Authority) had ample authority to decide to pay half wages during the period of interdiction of the Petitioner.

Further, it is evident that, the aforesaid Sections of the Establishments Code are to the effect that, when a public officer is interdicted, the Disciplinary Authority may *either* not

pay him any emoluments during the period of interdiction or pay him one-half of his emoluments during that period.

There does not seem to be any provision made in the Establishments Code for the Disciplinary Authority to decide to pay the full emoluments to a public officer who is under interdiction. This is presumably because a public officer who is under interdiction does no work for the State during that period. This thinking is reflected in Section 31:17 of the Establishments Code which warns that, since reinstatement of a public officer who has been interdicted without sufficient cause would result in him being paid his emoluments for the period of no work, the Disciplinary Authority should satisfy itself before a public officer is interdicted.

In view of the aforesaid, it is clear that, the Public Service Commission was acting entirely within the scope of its lawful authority and in pursuance of the applicable provisions of the Establishments Code when it decided to pay half wages during the period of interdiction of the Petitioner.

Next, it is also necessary to consider whether this decision of the Public Service Commission was reasonable.

In this regard, I note that, the eighteen Charges of misconduct against the Petitioner as set out in the Charge Sheet and Amended Charge Sheet (the Petitioner was later found to be guilty of nine Charges) were of a grave nature. The gravity of these Charges was heightened by the fact that, the alleged misconduct was committed during the course of the Petitioner's duties as Principal of a reputed and long established College. That was a position of trust and the Petitioner was required to conform to the highest standards of probity. He was duty bound to set an example to the students and protect the reputation of the College. Any failure to do so would, in itself, amount to misconduct of a grave nature. In these circumstances, it is patently clear that, the Public Service Commission acted reasonably and in terms of Section 31:12 of the Establishments Code when it decided to pay only half wages during the period the period of interdiction.

Further, as mentioned above, Section 31:11 read with Section 31:11:1 prohibits the payment of any emoluments to a public officer during the period of his interdiction if legal proceedings had been instituted against him for "*an offence of bribery or corruption or fraud*". In this case, the Petitioner has been charged with an Offence under Section 23A of the Bribery Act No. 11 of 1954, as amended. Section 23A is in Part II of the Bribery Act which sets out the several "*OFFENCES OF BRIBERY*".

In these circumstances, it seems to me that, the Public Service Commission should have acted in terms of the prohibition stipulated Section 31:11 read with Section 31:11:1

of the Establishments Code and not paid any emoluments to the Petitioner during the period of interdiction.

However, it appears that, the Public Service Commission has taken a lenient approach and decided to pay half wages to the Petitioner during the period of interdiction. Such leniency may have been misguided. But it is too late for anything to be done about it now.

In Paragraphs [13] (c) and 14 (d) of his Petition, the Petitioner has also urged that, he was entitled to be paid his full emoluments during the period of interdiction because the Charges of misconduct against him in the disciplinary proceedings are independent of and different to the Offence upon which he was indicted in the High Court. I do not agree with this contention since the aforesaid provisions of the Establishments Code make it clear that, when a public officer is interdicted, the Disciplinary Authority has to decide whether to not pay him any emoluments during the period of interdiction or whether to pay one-half of his emoluments during that period, based upon the Charges of misconduct against the public officer in the disciplinary proceedings. The nature of the Offence in the Indictment may have become relevant only if the Public Service Commission had decided to not pay the Petitioner any emoluments during the period of interdiction under and in terms of Section 31:11, Section 31:11:1 and Section 31:11:2. But, the Public Service Commission has not acted under these Sections. Instead, the Public Service Commission has acted in terms of Section 31:12 of the Establishments Code where it only the nature of the Charges of misconduct in the disciplinary proceedings which are relevant.

In the aforesaid circumstances, I am of the view that, the Public Service Commission acted both lawfully and reasonably when it decided to pay half wages to the Petitioner during the period of his interdiction.

For the aforesaid reasons, I see no merit in the Petitioner's claim that, the decision to pay half wages during the period of interdiction violated his fundamental rights under Article 12 (1) of the Constitution.

The remaining issue is the Petitioner's contention that, the decision to impose a deduction of 10% in the monthly pension payable to the Petitioner violated his fundamental rights under Article 12 (1) of the Constitution.

In Paragraphs [13] (a) and [13] (b) of his Petition, the Petitioner contends that, since the Public Service Commission was the Disciplinary Authority in respect of the Petitioner, the 3rd Respondent was required to abide by the recommendation made by the Public Service Commission, in its letter marked "**P10**", to impose a deduction of 25% of the gratuity payable to the Petitioner. On this basis, the Petitioner states that, the 3rd

Respondent had no authority to go further and *additionally* impose a deduction of 10% in the pension payable to the Petitioner. The Petitioner's contention is that, the final decision lies with the Public Service Commission (as the Disciplinary Authority) and the role of the 3rd Respondent is limited to implementing the decision of the Public Service Commission.

At the outset, it is necessary to note that, the Public Service Commission has authority in respect of a public officer only during his period of service. This is evident from Article 55 (3) of the Constitution which states that, the Public Service Commission is vested with "*the appointment, promotion, transfer, disciplinary control and dismissal*" of public officers. These are all areas which relate and apply to the period of service of a public officer.

However, the payment of pension and gratuity to a public officer arises only *after* that public officer ceases to be in service – *ie:* upon retirement. Therefore, it is clear that, issues relating to the payment of pension and gratuity to a public officer do not fall within the province of the Public Service Commission.

The Regulations relating to the criteria governing the entitlement of public officers to payment of a pension etc are set out in the 'Minutes on Pensions', which was first proclaimed in 1948 and has been since amended, from time to time. By operation of Section 2 (*kk*) of the Interpretation Ordinance No.12 of 1901, as amended, the Minutes on Pensions have the force of written Law.

A perusal of the Minutes on Pensions make it clear that, the authority vested with the power of making decisions under and in terms of the Minutes on Pensions is the 3rd Respondent [Secretary, Ministry of Public Administration and Home Affairs, which is presently named the 'Ministry of Public Administration and Management']. This is logically so since it is this Ministry which is responsible for the administration and payment of pensions. The Department of Pensions functions under the aegis of this Ministry.

Sections 12 (1), 12 (2) and 12 (3) of the Minutes on Pensions deal with deductions to be imposed on pensions paid to public officers against whom disciplinary proceedings are pending at the time of their retirement .

Section 12 (2) of the Minutes on Pension states:

"Where any inquiry pending at the time of retirement of an officer from the public service, and concluded after such retirement, discloses any negligence, irregularity or misconduct on his part during his period of service, and if the explanation tendered by him in respect of the findings of such inquiry is

considered to be unsatisfactory by the competent authority or if no explanation is tendered by him in respect of these findings, the Permanent Secretary, Ministry of Public Administration, Local Government and Home Affairs may either withhold or reduce any pension, gratuity or other allowance payable or awarded to such officer under these Minutes”.

The present case squarely falls within the ambit of Section 12 (2) of the Minutes on Pensions which deals with situations where: (i) a disciplinary inquiry was pending against the public officer at the time of his retirement; (ii) that disciplinary inquiry was concluded after the public officer retired’ and (iii) the public officer was found to be guilty of misconduct at this disciplinary inquiry. As I mentioned earlier, the Petitioner admits that, Section 12 (2) of the Minutes on Pensions applies.

Section 12 (2) of the Minutes on Pensions clearly states that, in the aforesaid circumstances, the 3rd Respondent was vested with the lawful authority to “*withhold or reduce any pension, gratuity or allowance*” payable to the Petitioner under and in terms of the Minutes on Pensions.

Thus, it is evident that, the 3rd Respondent was vested with the lawful authority to decide that, the pension payable to the Petitioner should be withheld or reduced in addition to deciding to accept and direct the implementation of the recommendation made by the Public Service Commission to effect a deduction of 25% of the gratuity.

It should be noted that, since the Petitioner had retired and the matter of the payment of pension and gratuity was outside its area of authority, the Public Service Commission, (as the Disciplinary Authority which held the disciplinary inquiry) could only recommend the measures it thought were suitable with regard to the pension and gratuity payable to the Petitioner. Such a recommendation has to be made to the 3rd Respondent who, as set out above, was the authority vested with the power to take the final decision with regard to the payment of pension and gratuity to the Petitioner.

In fact, the above process is specifically laid down in Section 36:7 of the Establishments Code. Section 36:7 stipulates that, the Disciplinary Authority finds a public officer who has previously retired, guilty of misconduct after a disciplinary inquiry is held, the Disciplinary Authority should send its recommendation, to the 3rd Respondent, regarding whether the public officer should be deprived of his full pension and gratuity or only a percentage thereof, together with the Charge Sheet, report of the disciplinary inquiry and all other relevant documents. That is what the Public Service Commission did by its letter marked “**P10**”.

As stated above, on receipt of this recommendation made by the Public Service Commission in terms of Section 36:7 of the Establishments Code, the 3rd Respondent

was, by operation of Section 12 (2) of the Minutes on Pensions, vested with the lawful authority to decide whether to either accept, reject or vary this recommendation.

On the face of it, the 3rd Respondent appears to have exercised this lawful authority vested in him by Section 12 (2) of the Minutes on Pensions, when he decided to accept the recommendation made by the Public Service Commission to impose a deduction of 25% of the gratuity and, *in addition*, decided to direct the deduction of 10% of the pension payable to the Petitioner.

In these circumstances, the Petitioner's contention that, the 3rd Respondent did not have any authority to vary the recommendation of the Public Service Commission, has no legal basis.

But, the aforesaid decision of the 3rd Respondent to direct the deduction of 10% of the pension payable to the Petitioner is liable to be set aside for a different reason.

Section 12 (2) makes it clear that, 3rd Respondent was authorised to decide to "*withhold or reduce any pension, gratuity or allowance*" payable to the Petitioner only *after* the Public Service Commission [which is the "*competent authority*" referred to in Section 12 (2)] had considered the Petitioner's explanation regarding "*the findings*" of the disciplinary inquiry and found such explanation to be unsatisfactory or if the Petitioner did not tender an explanation regarding "*the findings*" of the disciplinary inquiry.

Thus, Section 12 (2) imposed a requirement on the Public Service Commission to call for an explanation from the Petitioner with regard to "*the findings*" of the disciplinary inquiry at which he had been found to be guilty of Charges of misconduct.

It is only *after* the Public Service Commission called for that explanation and considered it or the Petitioner failed to submit an explanation despite being called upon to do so, that, the 3rd Respondent was authorised to take a decision to "*withhold or reduce any pension, gratuity or allowance*" payable to that public officer.

Further, though not expressly stated in Section 12 (2) of the Minutes on Pensions, it is implicit in the above process that, the explanation submitted by the public officer with regard to "*the findings*" of the disciplinary inquiry would have to be submitted to the 3rd Respondent for his consideration *prior to* the 3rd Respondent taking a decision whether to "*withhold or reduce any pension, gratuity or allowance*" payable to that public officer. This is reflected in Section 12 (3) of the Minutes on Pensions which provides for the 3rd Respondent to request a public officer who has failed to submit his explanation regarding "*the findings*" of the Disciplinary Inquiry to submit his explanation directly to the 3rd Respondent.

It is clear to me that, there is good reason for the imposition of this requirement since it must be kept in mind that, a public officer who has spent decades in the public service prior to his retirement, has `earned' his pension. He has served in the expectation of receiving a pension (and, where applicable, a gratuity) from the time he retires. He has relied on this. His plans for his old age and meeting the needs of his family during that time, are based, to a considerable extent, on his expectation that he will receive a monthly pension during his lifetime.

In such circumstances, if a public officer who has retired is to be deprived of his pension (or the pension is to be reduced) as a result of an administrative decision taken by the 3rd Respondent in terms of Section 12 (2) of the Minute on Pensions, it is only fair and reasonable that, the public officer is given an opportunity to submit his explanation regarding "*the findings*" of the disciplinary inquiry and to have this explanation considered, before the 3rd Respondent takes a decision.

In the present case, the Petitioner was a public officer for 38 years and, as I recounted at the commencement of this Judgment, during this time, he served in 11 schools in different parts of Sri Lanka and also served in administrative capacities in regional Offices. The observations I made in the preceding two paragraphs, would surely apply to the Petitioner too.

However, the material before us makes it clear that, the Public Service Commission failed to call for and consider the Petitioner's explanation with regard to "*the findings*" of the disciplinary inquiry at which the Petitioner was found to be guilty of Charges of misconduct.

Instead, the Public Service Commission recommended the deduction of 25% of the gratuity and the 3rd Respondent has directed that, this recommendation be implemented and, in addition, directed the deduction of 10% of the pension payable to the Petitioner, without complying with the aforesaid requirement stipulated in Section 12 (2) of the Minutes.

I am of the view that, strict compliance with the provisions of Section 12 (2) is required prior to the 3rd Respondent taking a decision to "*withhold or reduce any pension, gratuity or allowance*" payable to a retired public officer. I am fortified in reaching this conclusion by the Judgments of Dr. Amerasinghe J. in GODAWELA vs. CHANDRADASA [*supra*] and Gooneratne J. in ISMAIL vs. MAJEED [*supra*] which show that, their Lordships were of the view that, the provisions of the Minutes on Pensions must be complied with.

In these circumstances, I hold that, the failure to call for and consider the Petitioner's explanation with regard to "*the findings*" of the disciplinary inquiry *before* the 3rd

Respondent directed the deduction of 10% of the pension payable to the Petitioner, results in that decision having been taken in violation of the requirements of Section 12 (2) of the Minutes on Pensions and arbitrarily. Consequently, that decision has denied the Petitioner the equal protection of the Law which is guaranteed by Article 12 (1) of the Constitution.

For purposes of record, I should mention that, a similar finding could have been made with regard to the decision of the 3rd Respondent to direct the imposition of a deduction of 25% of the gratuity. But, the Petitioner has accepted this deduction and, in any event, a challenge to that deduction in this Application, would be time barred since the Petitioner was aware of that deduction from the time he received the letter dated 16th November 2011 marked “**P10**”.

For the aforesaid reasons, I hold that, the 3rd Respondent has, by his decision to direct that 10% be deducted from the pension payable to the Petitioner, violated the Petitioner’s fundamental rights under Article 12 (1) of the Constitution.

Accordingly, I make Order setting aside only the decision of the 3rd Respondent directing that 10% be deducted from the pension payable to the Petitioner. For purposes of clarity, that decision has been set out as “Item II” in the letter marked “**3R-3**” and is referred to as “Item II” in the letter marked “**P11**”.

The 1A Respondent, 3A Respondent and 15A Respondent are directed to ensure that, the Petitioner is paid his full monthly pension (without any deductions) with effect from the month of October 2016 onwards in accordance with the procedure set out in the Minutes on Pensions and other applicable regulations. The amount to be paid should take into account any increases in the rates of pensions which may have come into effect from the date the Petitioner retired on 30th October 2007.

Further, I direct that, the Petitioner is to be paid the aggregate amount that was deducted from the Petitioner’s monthly pension in consequence of the aforesaid decision of the Secretary, Ministry of Public Administration and Home Affairs (which directed that 10% be deducted from the pension payable to the Petitioner). That payment should cover the period from the date of the Petitioner’s retirement on 30th October 2007 up to 30th September 2016. The 1A Respondent, 3A Respondent and 15A Respondent are directed to ensure that this is done on or before 31st December 2016.

The Petitioner has urged that, the decision of the 3rd Respondent directing that 10% be deducted from the pension payable to the Petitioner was unreasonable, arbitrary,

excessive and disproportionate and that it lacked legal clarity. In view of my aforesaid determination, I do not need to consider these issues.

The State will pay the Petitioner a sum of Rs.25,000/- as Costs.

Judge of the Supreme Court

B.P. Aluwihare, PC. J

Judge of the Supreme Court

Priyantha Jayawardena, PC.J

Judge of the Supreme Court