

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

In the matter of an application under
Article 126 of the Constitution of the
Democratic Socialist Republic of Sri Lanka.

B.P. Udawatta
No.239/15A,Mada Mawatha
Sri Sumanagala Road
Pannipitiya

Petitioner

SC FR No. 349/2011

Vs.

1. National Water Supply & Drainage
Board
Galle Road, Ratmalana.
2. K.L.L. Premanath
General Manager,
National Water Supply & Drainage
Board, Galle Road, Ratmalana.
3. A. Abeygunasekera
Ministry of Water Supply & Drainage
“Lakdiya Medura, No. 35, Pelawatta
Battaramulla.
4. K. Hettiarachchi
5. K.D. Gamini Gunaratne
6. N.P. Thibbotumunuwa
7. Dr. P.G. Mahipala
8. A.K. Seneviratne
9. P. Sanath Panawennage

4th to 9th All of National Water Supply
& Drainage Board, Galle Road,
Ratmalana.

10. M.P. Fernando
No. 118/36, Uyana Road, Uyana,
Moratuwa.

11. K.A.D.S. Nanayakkara
No. 59, Kanduboda, Delgoda.

12. Hon. Attorney General
Attorney General's Department
Colombo 12.

Respondents

Before : Marsoof, PC, J
Dep, PC. J &
Marasinghe, J

Counsel : J.C. Weliamuna with Pasindu Silva for the
Petitioner

M.A. Sumenthiran with J. Arulananthan for the
10th Respondent.

Viraj Dayaratne , DSG for 1-9th and 12th
Respondents.

Argued on : 10.07.2014

Decided on : 27.11.2014

Priyasath Dep, PC, J

The Petitioner at all times material to this application was serving as the Chief Accountant of the Finance Division of the National Water Supply and Drainage Board (hereinafter referred to as 'NWSDB' or 'the Board')). M.P. Fernando the 10th Respondent was the Deputy General Manger (Finance) of the Board and he was the immediate superior of the Petitioner during the period the financial transaction that resulted in disciplinary action taken against the Petitioner had taken place.

The Petitioner in this application challenged the arbitrary, irrational and malicious decision of one or more of the respondents and /or of the authorities to retire the Petitioner from service disregarding the recommendations and /or the decisions of the relevant authorities to reinstate him in service.

Petitioner states that after serving in various statutory boards he joined the NWSDB as an Accountant (Revenue) and whilst serving in the Board he obtained promotions at various times and in 1995 he was appointed as the Chief Accountant of the Finance Division. The 10th Respondent was his immediate superior. The Petitioner was sent on compulsory leave by a letter dated 12.03.2009 alleging that the Petitioner on or about 13-01-1997 had deposited a cheque for Rs. 1,792,992.49 in a private account maintained at the People's Bank, Borella Branch which is an amount payable to Colombo Municipal Council in 1996. Subsequently by letter dated 8.6.2009 he was interdicted and he was served with a charge sheet and an inquiry was held against him. At the time the inquiry commenced he was on his first extension and in view of the inquiry his subsequent extensions were not granted.

As regards to the allegation of issuing a cheque to a person not entitled to it he had given an explanation justifying his conduct. He stated that on 13-01-1997, the 10th Respondent who was his immediate superior, in the course of his ordinary duty called him to his office room and informed him that the Mayor of Colombo had made a request to deposit the cheque to the account furnished by the Mayor. The 10th Respondent gave a direction in writing to credit that money to the account number 1070097208. Petitioner also made a minute below the instructions given by the 10th Respondent. He stated that the general practice is to draw the cheque in favour of the Treasurer, Colombo Municipal Council. This cheque was addressed to Manager, Bank of Ceylon, Dehiwala. He states that to the best of his knowledge no inquiries were made either by the Colombo Municipal Council or other authorities. The 10th Respondent resigned from NWSDB in 2005. This fraud was detected in 2009 after his resignation. Investigations revealed that the 10th Respondent was involved in a similar fraud when he was serving in Ampara branch of the NWSDB.

The Petitioner states that on 23.01.2009 he was summoned by Acting DGM(Audit) and he met him and he was shown a payment voucher(P3) and he said that the cheque referred to in the voucher was deposited in the personal account of the 10th Respondent. He was asked to make a statement and he gave a statement. Thereafter statements of other officers who were involved in preparing vouchers, writing and signing the cheque were recorded.

He was interdicted and an inquiry was held. After the inquiry he was found guilty by the inquiring officer and his recommendations were submitted to the Board. The Disciplinary Committee of the Board considered the report and after discussing with the inquiring officer and DGM(Finance), strongly recommended that the Petitioner be reinstated with back wages.

The Petitioner states that he was surprised to receive a letter dated 25.7.2011 informing him that he had been retired from service. In that letter marked P15, the Petitioner was informed by the General Manager of the 1st Respondent Board that the Board of Directors had decided on 16.6.2011 to retire him with immediate effect.

The Petitioner states that the Board has erroneously reported that he was on compulsory leave with pay and the Petitioner to be reinstated. He states that the General Manager of the Board is the disciplinary authority in respect of the employees and the Disciplinary Committee has no authority to take decisions in disciplinary matters. Petitioner states that by his letter dated 10th August 2011 he preferred an appeal to the Secretary to the Minister of Water Supply and Drainage but did not receive a reply.

The main relief claimed by the Petitioner consists of declarations that his fundamental right to equality guaranteed by Article 12 of the Constitution has been violated and that the decision of the 2nd Respondent reflected in P15 is contrary to law and null and void.

The 2nd Respondent K.L.Lal Premanath, the General Manager of the 1st Respondent Board filed an affidavit on his behalf and on behalf of the Board refuting the allegations made by the Petitioner. He stated that the inquiring officer found the Petitioner guilty of all charges and his report was handed over to the Disciplinary Committee which had a discussion with the inquiring officer and was of the view that the Petitioner alone cannot be blamed for the said fraud and was of the view that the Petitioner should be reinstated. As it was not possible for him to reinstate the Petitioner without a decision from the Board regarding the extension of the Petitioner's services, he sought the approval of the Board.

Thereafter the matter was considered by the Board of Directors on 16.6.2011 and the Board decided to reinstate the Petitioner with immediate effect and to send him on retirement. The 2nd Respondent by his letter dated 25-7-2011 marked P15 informed the Petitioner that the Board of Directors had decided on 16.6.2011 to retire him with immediate effect.

It is apparent from the Board minute marked 2R3 that the board also directed the General Manager / Deputy General Manager (Personal and Administration) to write to the People's Bank to investigate whether the bank officers were involved in the aforesaid fraud.

The Petitioner had submitted an appeal dated 10.8.2011 to the 3rd Respondent, the Secretary to the Ministry of Water Supply and Drainage against the decision of the Board to retire the Petitioner, mainly on the basis that he was entitled to his final extension of service. The 3rd Respondent in his affidavit stated that he referred the Appeal to the Appeals Board in the Ministry. In paragraph 7 of the affidavit he stated that in considering the appeal the Appeal Board had considered the charges framed against the Petitioner, the evidence led at the inquiry, report of the inquiring officer, his recommendations and matters stated in the appeal.

The 3rd Respondent having considered the recommendations of the Appeals Board and considering the attendant circumstances decided to retire the Petitioner with effect from the last date on which he had worked. The 3rd Respondent, by his communication dated 3.10.2011 (3R2) informed the Board of his decision.

Learned Counsel for the Petitioner had submitted that the said decision of the Secretary is not consistent with the decision of the Disciplinary Committee and the decision of the

Board of Directors and by retiring the Petitioner with effect from the last date he worked would cause him serious prejudice. The Board in its decision dated 16-6-2011 (P15) decided to reinstate the Petitioner and send him on retirement from that date whereas the 3rd Respondent by his communication dated 3-01-2011 decided to retire the Petitioner from the last date he worked in the Board that is 8.06. 2009, the date been the date of interdiction. Therefore it is apparent that the terms in 3R2 is less favourable than the terms in P15.

Although in the reasoned communication of the Secretary(3rd Respondent) marked 3R2, he has emphasized that as the Chief Accountant, the Petitioner had the responsibility to ascertain whether he was crediting money to the correct account of the person intended to receive the same, it is also necessary for this court to take into consideration the position of the Petitioner who claims that the account number was furnish to him by the 10th Respondent who was his superior officer whom he had trusted. It is significant that the 10th Respondent was the Deputy General Manager (Finance) of the 1st Respondent Board and that he had resigned from service few years after the crediting of money into his account and long before the fraud was detected.

In all the circumstance of this case ,I am in agreement with the view of the Secretary to the Ministry which also appears to be the view of the Inquiry Officer, Disciplinary Committee, and the Board of Directors that it may not be appropriate to continue the Petitioner in service. However, since the Board of Directors has decided to retire him with effect from the date of the decision of the Board of Directors, namely 16.6.2011, in my view it would be equitable to pay him all arrears of salary up to that date.

It appears that the petition in this case was filed on 25.8.2011 and the decision of the Secretary to the Ministry was made after the institution of proceedings in this Court. The Petitioner has only prayed that P15 be declared a nullity and is violative of his fundamental rights. Hence, the Petitioner had no opportunity of praying for any relief against the decision of the Secretary to the Ministry dated 3.10.2011 (3R2). This decision too had been taken on the basis that the Petitioner has been negligent in the discharge of his duty, but the prejudice caused to the Petitioner by this decision was that he was deprived of two years back wages.

In all the circumstances of this case, I am of the view that the decision conveyed by P15 is justified as the facts demonstrate negligent on the part of the Petitioner. Hence, while dismissing the Petition, in the exercise of the equitable jurisdiction of this Court, the Respondents may be directed to give effect to the decision taken by Board of Directors that the date of retirement should be 16.6.2011 and not the last date on which the Petitioner had worked.

It is to be observed that just and equitable orders are not alien to industrial disputes. If the Petitioner filed an application in the Labour Tribunal against the termination of his employment, the Labour Tribunal under section 31B of the Industrial Disputes Act has the power to make a just and equitable order. There are instances where appropriate Labour Tribunals had granted relief to applicants in applications where termination was held to be justified.

For the reasons stated above, we direct the 1st Respondent namely the National Water Supplies and Drainage Board to give effect to its decision dated 16-06-2011 communicated in the letter dated 25-07-2011 marked P15. Subject to this direction the application is dismissed.

No Costs.

Judge of the Supreme Court

Saleem Marsoof, P.C., J.
I agree.

Judge of the Supreme Court

Rohini Marasinghe, J.
I agree

Judge of the Supreme Court