

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 of the Constitution of the
Democratic Socialist Republic of Sri Lanka.

SC. (FR) Application No. 384/2016

Upali Sarath Kumara,
Pothuwewa,
Maddegama,
Wellawa.

PETITIONER

-Vs-

1. S.A. Anura Sathurusinghe,
Conservator General of Forests,
Forest Department,
“ Sampathpaya”
No.3,
Battaramulla.

2. M.L. Abdul Majeed,
Conservator of Forests
(Planning and Monitoring)
(formerly Protection and Law
Enforcement),
Forest Department,
“Sampathpaya”,
No.3,
Battaramulla.
3. Nimal Rathnaweera,
Special Forester (Protection and Law
Enforcement),
Forest Department,
“Sampathpaya”,
No.3, Battaramulla.
4. P.A.G.S. Nandakumara,
Conservator of Forests
(Protection and Law Enforcement)
Forest Department,
“Sampathpaya”
No.3, Battaramulla.
5. R.S. Kulatunga,
Additional Conservator General of Forests,
(Forest Protection, Operations &
Management),

Forest Department,
“Sampathpaya”,
No.3, Battaramulla.

6. L.A.D. Geetha Indrani,
Additional Conservator
General of Forests
(Human Resource Management,
Administration & Institutional
Development),
Forest Department,
“Sampathpaya”,
No.3,
Battaramulla.
7. Udaya R. Seneviratne,
Secretary,
Ministry of Mahaweli Development and
Environment,
No.82, “Sampathpaya”,
Rajamalwatte Road,
Battaramulla.
8. A.H.L.D. Gamini Wijesinghe,
Director (Education Training and
Research),
Ministry of Mahaweli Development,
and Environment,
No.82,

“Sampathpaya”,
Rajamalwatte Road,
Battaramulla.

9. Dharmasena Dissanayake,
Chairman,
Public Service Commission,
No.177,
Nawala Road,
Narahenpita,
Colombo-05.

10. A. Salam Abdul Waid,
Member,
Public Service Commission,
No.177,
Nawala Road,
Narahenpita,
Colombo- 05.

11. D. Shirantha Wijayatilaka,
Member,
Public Service Commission,
No.177,
Nawala Road,
Narahenpita,
Colombo-05.

12. Prathap Ramanujam,
Member,
Public Service Commission,
No.177,
Nawala Road
Narahenpita,
Colombo -05.

13. V. Jegarasasingam,
Member,
Public Service Commission,
No.177,
Nawala Road,
Narahenpita, Colombo-05.

14. Santi Nihal Seneviratne,
Member,
Public Service Commission,
No.177,
Nawala Road,
Narahenpita, Colombo-05

15. S. Ranugge,
Member,
Public Service Commission,
No.177,
Nawala Road,
Narahenpita, Colombo-05

16. D.L. Mendis,
Member,
Public Service Commission,
No.177,
Nawala Road,
Narahenpita, Colombo-05

17. Sarath Jayathilaka,
Member,
Public Service Commission,
No.177,
Nawala Road,
Narahenpita, Colombo-05.

18. Nayanamala Ranasinghe,
Director,
Sri Lanka Scientific Service/
Technological Service/Architectural
Service,
Ministry of Public Administration and
Management,
Independence Square,
Colombo-07.

19. Jagath Dias,
Director General of Pensions,

Maligawatte Secretariat,
Maligawatta,
Colombo-10.

20. M.L. Abdul Majeed,
72/10,
Sri Sangaraja Mawatha,
Colombo-10.

21. Hon. Attorney-General,
Attorney- General's Department,
Colombo-12.

RESPONDENTS

Before : Sisira J de Abrew J
Vijith Malalgoda PC J
Murdu Fernando PC J

Counsel : Neranjan de Silva with Kalhara Gunawardena for the Petitioner
S Barrie SSC for the Respondents

Argued on : 28.5.2018

Decided on : 03.12.2018

Sisira J De Abrew J

The Petitioner in his petition filed in this court complains that his fundamental rights guaranteed by Article 12(1) and 14(1)(g) of the Constitution have been violated by the Respondents. This Court by its order dated 24.1.2017, granted

leave to proceed for alleged violation of Article 12(1) of the Constitution. The Petitioner joined the Forest Department on 10.10.1980. He was later promoted as Range Forest Officer and Assistant Divisional Forest Officer. The 2nd Respondent, the Conservator of Forest by letter dated 16.12.2014 marked P6 called for explanations from the Petitioner on certain misconduct/irregularities alleged to have been committed by the Petitioner. Later the 1st Respondent (Conservator General of Forest) appointed an inquiring officer to conduct an inquiry. The Petitioner by letter dated 16.12.2015 marked P22 informed the 1st Respondent that he would retire on 6.2.2016 as he would be reaching sixty years on 6.2.2016. The Petitioner by the said letter, requested the 1st Respondent to take steps to pay his pension. The 1st Respondent (Conservator General of Forest) by letter dated 11.2.2016 marked P26 approved the retirement of the Petitioner under Section 12:2 of the Minutes on Pensions. The Petitioner retired on 6.2.2016 after 35 years of service. **It has to be noted here that the inquiry against the Petitioner had not been concluded on the day of his retirement.** The Petitioner filed this case on 25.10.2016. The inquiry against the Petitioner had not been concluded even on 25.10.2016. The Petitioner complains that he has so far not got his pension and his fundamental rights guaranteed by the Constitution have been violated by the Respondents. This court by its order dated 24.1.2017 granted leave to proceed for the alleged violation of the Petitioner's fundamental rights guaranteed by Article 12(1) of the Constitution. At this stage it is necessary to consider Section 12(2) of the Minutes on Pensions. It reads as follows.

“When 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 those 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 pension of the Petitioner has now been suspended. As I pointed earlier the Inquiry against the Petitioner had not been concluded on the day of the retirement of the Petitioner. Can the Petitioner’s pension be withheld or reduced under Section 12(2) of the Minutes on Pensions when the inquiry against him had not been concluded on the day of his retirement? When I consider Section 12(2) of the Minutes on Pensions, I hold the view that in order to withhold or reduce pension of an officer/employee of the Public Service under Section 12(2) of the Minutes on Pensions, the inquiry against the said officer/employee should come to an end. If the inquiry against the officer/employee of the Public Service has not been concluded on the day of the retirement, his pension cannot be withheld or reduced in terms of Section 12(2) of the Minutes on Pensions. Learned SSC cited Section 178 of the Public Service Commission Rules Published in Government Gazette No 1589/30 dated 20.2.2009 which reads as follows:-

“178. An officer may be in service till 57 years of age without annual extensions of service. However, if a public officer intends to retire from the public service on completion of 55 years of age or thereafter, or on reaching the compulsory age of retirement he shall forward such request for retirement formally in writing to the Appointing Authority at least six months before the date he intends to retire. Provided however

(i) Where disciplinary proceedings are pending against the officer or such disciplinary proceedings are contemplated the retirement of the officer shall be made subject to

Section 12 of the Minutes on Pensions. It shall be the duty of the Head of the Department and/or Head of Institution to bring such matters to the notice of the Appointing Authority when request for retirement of public officers are made.

(ii) Where the officer commits a misconduct warranting a disciplinary action against him after his retirement has been approved by the appointing authority, the order for retirement shall be converted from normal retirement to that of a retirement under Section 12 of the Minutes on Pensions by the Appointing Authority, when such misconduct is brought to the notice of the Appointing Authority before the effective date of retirement and shall serve or cause to be served a copy of the order on the officer concerned.

(iii) Where the Appointing Authority has granted a normal retirement to a public officer on the basis that no disciplinary proceedings are pending or contemplated and if such pending disciplinary proceedings or contemplated disciplinary action is brought to the notice of the Appointing Authority, after the normal retirement has been granted and before the effective date of retirement the Appointing Authority shall convert the normal retirement to that of a retirement under Section 12 of the Minutes on Pensions and shall serve or cause to be served a copy of the order on the officer concerned.”

Learned Senior State Counsel contended that pension of the Petitioner could be suspended in terms of Section 12(1) of Minutes on Pensions. Section 12(1) of the Minutes on Pensions reads as follows.

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

An examination of Section 12(1) of the Minutes on Pensions reveals that a pension of a public servant in terms 12(1) of Minutes on Pensions can be withheld or reduced only if the following factors are satisfied.

1. At the time of retirement of public servant from public service disciplinary proceedings were pending or contemplated in respect of negligence, irregularity or misconduct alleged to have been committed by him and
2. Where the explanation tendered by the public servant in respect of negligence, irregularity or misconduct alleged to have been committed by him is considered to be unsatisfactory by the competent authority.

After the above factors are fulfilled the Permanent Secretary, Ministry of Public Administration, Local Government and Home Affairs can take a decision to either to withhold or reduce any pension, gratuity or other allowance payable or awarded to such officer. However if this power has been delegated to an officer by the aforementioned Permanent Secretary, the said officer can take the decision. The above view is supported by the judicial decision in the case of Wilbert Godawela Vs Chandradasa and Others [1995] 2SLR 338 wherein His Lordship Justice Amarasinghe held as follows.

“A pension could in terms of Section 12 (1) be withheld or reduced only where

(1) at the time of his retirement from the public service disciplinary proceedings were "pending or contemplated", and,

(2) where the explanation tendered by the Public Servant concerned is considered to be unsatisfactory.

In the matter before us there was no disciplinary proceedings pending at the time of retirement. Nor were such proceedings contemplated.

It is only if an explanation tendered by the Public Servant concerned is unsatisfactory that his pension could be withheld or reduced.”

In the case of Peiris VS Wijesuriya Director of Irrigation and Others [1999] 1SLR 295 His Lordship Justice Amarasinghe observed the following facts.

“The petitioner who was a storekeeper in the Irrigation Department was interdicted on the detection of a shortage of goods. Before disciplinary proceedings commenced the petitioner reached the age of 55 years; whereupon he was retired subject to Rule 12 of the Minutes on Pensions. Thereafter a charge-sheet was served on the petitioner. The petitioner's explanation was rejected and he was paid a reduced commuted pension after deducting the value of the shortage. The petitioner urged that no disciplinary inquiry was held observing the time limits laid down by a circular issued by the Secretary, Ministry of Public Administration and that the retirement subject to Rule 12 (1) of Minutes on Pensions was illegal as disciplinary proceedings were not pending or contemplated at the time of his retirement as required by that Rule.”

His Lordship Justice Amarasinghe held as follows.

“The time limits laid down by the circular were directory and hence, the failure to observe them did not make the acts of the respondent invalid and though no disciplinary proceedings were pending at the time of the petitioner's retirement disciplinary proceedings were contemplated.”

The judicial decision in the above case has discussed a situation under Section 12(1) of the Minutes on Pensions. This judicial decision has no application to the present case as it (the present case) deals with a situation under Section 12(2) of the Minutes on Pensions.

It has to be noted here that no decision has been taken by the relevant officers to retire the Petitioner in terms of Section 12(1) of Minutes on Pensions. Therefore the above contention of the learned SSC does not arise for consideration. Section

178 of the Public Service Commission Rules does not support the contention of the learned SSC. At this stage I would like to consider the following question. Can the court consider an argument that although a decision has been taken to retire the Petitioner in terms Section 12(2) of the Minutes on Pensions, it is deemed to have been taken in terms Section 12(1) of the Minutes on Pensions. I now advert to this contention. Both sections contemplate an explanation tendered by the public servant. The explanation discussed in Section 12(1) of the Minutes on Pensions is the explanation tendered by the public servant **in respect of negligence, irregularity or misconduct** alleged to have been committed by him during his period of service. But the explanation discussed in Section 12(2) of the Minutes on Pensions is the explanation tendered by the public servant **in respect of the findings of the inquiry** conducted against him on charges relating to his negligence, irregularity or misconduct during his period of service. Section 12(2) contemplates a situation that arises after conclusion of the inquiry against the public servant. But in Section 12(1) of the Minutes on Pensions contemplates a situation where disciplinary proceedings were pending. Further I would like to concentrate on the following question. Is there a decision taken by the Competent Authority in terms of Section 12(1) of the Minutes on Pension to the effect that the explanation tendered by the Petitioner in respect of negligence, irregularity or misconduct alleged to have been committed by him is unsatisfactory? The answer is in the negative. When I consider the above matters, I hold the view that I cannot consider the above argument that is to say that although a decision has been taken to retire the Petitioner in terms Section 12(2) of the Minutes on Pensions, it is deemed to have been taken in terms Section 12(1) of the Minutes on Pensions.

In order to take a decision in terms Section 12(2) of the Minutes on Pensions, the following criteria must be satisfied.

1. Inquiry which was pending against public servant at the time of his retirement must come to an end.
2. The findings of the inquiry should disclose his negligence, irregularity or misconduct on his part during his period of service.
3. Explanation tendered by public servant in respect of the findings of the inquiry must be considered by the competent authority and there should be a decision by the competent authority to the effect that the said explanation is unsatisfactory. However if the public servant fails to tender an explanation this requirement (3rd requirement) is not applicable.

After the above criteria are fulfilled, the Permanent Secretary, Ministry of Public Administration, Local Government and Home Affairs is required to take a decision either to withhold or reduce any pension, gratuity or other allowance payable or awarded to such officer. However if this power has been legally delegated to an officer by the aforementioned Permanent Secretary, the said officer can take the decision. The Respondents have taken a decision to retire the Petitioner in terms Section 12(2) of the Minutes on Pensions without the above mentioned criteria being satisfied. When I consider all the above matters, I hold the view that the decision taken to retire the Petitioner under Section 12(2) of the Minutes on Pensions is wrong.

The Petitioner retired on 6.2.2016. For the last two years the Petitioner has not received any percentage of his pension. He has served the Forest Department for a period of 25 years.

When I consider all the above matters, I hold that the Petitioner's fundamental rights guaranteed under Article 12(1) of the Constitution have been violated when

the 1st Respondent decided to approve the retirement of the Petitioner in terms of Section 12(2) of the Minutes on Pensions. The Petitioner is entitled to receive his pension on the basis that he has retired on reaching the age of 60 years. For the above reasons, I direct the Respondents to pay the petitioner's pension from 6.2.2016 on the basis that he has retired on reaching the age of 60 years. I direct the Conservator General of Forests to take all necessary legal steps to implement this judgment within one month from the date of this Judgment. However this judgment does not preclude the Respondents from taking a decision under Section 12 (2) of the Minutes on Pensions after taking the necessary steps set out in the said section.

The petitioner is entitled to the costs of this case.

The Registrar of the Court is directed to send certified copies of this judgment to all the Respondents.

Judge of the Supreme Court.

Vijith Malalgoda PC J

I agree.

Judge of the Supreme Court.

Murdu Fernando PC J

I agree.

Judge of the Supreme Court.

