

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

SC (FR) Application No. 389/2015

In the matter of an Application under
Section 12/126 of the Constitution

Mohamed Niswer Ismail
102/114, Madara Uyana,
4th Lane, Mattegoda.

PETITIONER

Vs.

1. Engineer Y. Abdul Majeed
Acting Director General of Irrigation
Department of Irrigation,
230, P.O. Box 1138
Buddhaloka Mawatha,
Colombo 7.
- 1A. Engineer Saman S.L. Weerasinghe
Director General of Irrigation
Department of Irrigation
230, P.O. Box 1138
Buddhaloka Mawatha,
Colombo 7.
2. Engineer R.M.W. Rathnayake
Secretary,
Ministry of Irrigation and Water
Resources Management,
No. 11, Jawatte Road,
Colombo 5.

3. J. Dadallage
Secretary, Ministry of Public
Administration & Management
Independence Square,
Colombo 7.
4. S. S. Hettiarachchi
Director General of Pensions
Department of Pensions
Maligawatte Secretariat,
Maligawatte, Colombo 10.
5. Justice Sathya Hettige P.C.,
6. Ananda Seneviratne
7. N. H. Pathirana
8. S. Thillandarajah
9. A. Mohamed Nahiya
10. Kanthie Wijetunge
11. Sunil S. Sirisena
12. Dr. I. M. Zoysa Gunasekera

(All members of the Public Service
Commission)

No. 177, Nawala Road,
Narahenpita, Colombo 5.

- 5A. Dharmasena Dissanayake
- 6A. A. Salam Abdul Waid
- 7A. D. Shirantha Wijayatilaka
- 8A. Dr. Prathap Ramanujam
- 9A. V. Jagarasasingam
- 10A. Santi Nihal Seneviratne
- 11A. S. Ranugge
- 12A. D. L. Mendis
- 12B. Sarath Jayathilaka

(All current members of the Public
Service Commission)

No. 177, Nawala Road,
Narahenpita, Colombo 5.

SUBSTITUTED RESPONDENTS

(in the room of the 5th – 12th
Respondents)

13. Hon. Attorney General
Attorney General's Department
P. O. Box 502,
Colombo 12.

RESPONDENTS

BEFORE: Priyasath Dep P.C., J.
Anil Gooneratne J. &
Nalin Perera J.

COUNSEL: M. Y. M. Faiz instructed by
R.A.N.C. Gunatillake for Petitioner

Parinda Ranasinghe D.S.G. for the Respondents

ARGUED ON: 07.07.2016

DECIDED ON: 20.09.2016

GOONERANTE J.

The Petitioner as pleaded in his petition dated 14.10.2015 retired from the public service as an Irrigation Engineer on 14.05.2014. His last

appointment in the public service as stated, he held the post of Divisional Engineer, Ratnapura. His main complaint is that he has not been paid a pension as from May 2014, and the prayer to the petition inter alia prays for the payment of commuted gratuity in a sum of Rs. 686,383.20. This court on or about 20.01.2016 granted leave to proceed for the alleged violation of Fundamental Rights enshrined under Article 12(1) of the Constitution.

Petitioner entered the Public Service as a Technical Assistant Class III in the Middle Level Technical Service (MLTS) of the Irrigation Department on or about March 1982 (P4). The body of the petition gives details of his gradual promotions in the Public Service (P5, P6 & P7). It is pleaded that Petitioner was placed as a Special Grade Engineering Assistant since 19.09.1998. The service particulars are contained in document P11. The letters P12, P13 indicates the appointment of the Petitioner as an Acting Engineer and P13/P14 as Irrigation Engineer and posted to Ratnapura.

Perusal of the material placed before court, it appears that letter P15, of 12.08.2014, provides some details as to why the Petitioner's pension was not paid. In the said letter Petitioner states that a request was made by him through the Colombo Zonal Director of Irrigation to retire him from the public service from 14.05.2014, on reaching the age of retirement. The said letter indicates that on making inquiries from the Head Office he became aware that

an incident occurred in the year 2008 (audit query) when he was Acting Divisional Irrigation Engineer in Wellawaya and a charge sheet was to follow against the Petitioner. Petitioner's position is that he was not made aware of same since 2008 and until his retirement the authorities concerned had not taken any steps and as such he was subjected to unfair treatment (attention drawn to P18).

Section 12(1) of the Minutes of Pensions reads thus:

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 to such public servant under these Minutes.

In this application the petitioner attempts to demonstrate that there is a violation of the requirements embodied in Section 12 of the Minutes on Pension. If that be the case this court would be in a better position to ascertain whether there was due compliance with the provisions contemplated under Section 12 of the Minutes on Pension, by searching intensively into the items of material presented to this court with this application. In this regard it would be necessary to find answers to the following questions.

- (a) Was the Petitioner informed of any contemplated disciplinary action against him during the period of his service or at any time of his retirement on 14.05.2014.
- (b) Were disciplinary proceedings contemplated by the authorities concerned during the period of service of the Petitioner.
- (c) Whether a charge sheet was issued within one month of the Petitioner's retirement as referred to in Public Administration Circular No. 29/90 (Section 1.12 of annex 3).
- (d) In the facts and circumstances of this case is a normal retirement under the Minutes of Pensions possible?

The Respondents no doubt rely on two letters marked 1R1 & 1R2.

The letter 1R1 dated 14.10.2010 is a letter despatched to Secretary, Ministry of Irrigation and Water Management by the Director General of Irrigation. The said letter refer to a preliminary investigations carried out by the Internal Auditors and decision had been taken to forward charges against the Petitioner and a draft charge is annexed to 1R1. The Draft charges are not made available to this court as stated therein.

Letter 1R2 is a letter by Director General, Irrigations dated 23.12.2014, addressed to Secretary to Ministry of Irrigations and Water Resources seeking approval to retire the Petitioner for the reason stated in the said letter. The reasons are noted as follows:

1. It is stated inter alia that the Petitioner on reaching the age of retirement had requested the authorities to retire him from service.
2. There had been two disciplinary proceedings initiated against the Petitioner. One being the proceedings initiated where he was serving in the Welioya project for which proceedings were terminated on a warning given to Petitioner. The other was when he was Acting Engineer for the Hambegamuwa Irrigation Scheme. In this connection draft charges were ready and Ministry approval was sought by several letters, (Paragraph 5 of 1R2) for which there was no response. As such the Irrigation Department could not take steps to retire the Petitioner nor could the Department confirm the Petitioner in the post of Engineer.

The letter 1R2 in paragraph 6 states that charge sheet could not be issued to the Petitioner and as such steps could not be taken to retire the Petitioner. Therefore the Director, Irrigation recommend to the Secretary of the relevant Ministry to retire the Petitioner under the normal retirement.

This court is mindful of the fact that the learned Senior Deputy Solicitor General has very honestly and correctly placed the above material notwithstanding the fact that letter 1R2 does not favour the state. No doubt the Hon. Attorney General in his expected duty of a quasi judicial role thought it fit to resist this application of the Petitioner. Nevertheless letter 1R1 demonstrate some form of compliance as regards the requisites in Section 12 of the Minutes on Pensions, letter 1R2 on the other hand no doubt display the indifferent

careless, non-seriousness attitude to official work of the authorities concerned.

The long delay to serve the charge sheet on the Petitioner dated 03.09.2015 is no excuse. It is almost 5 months after the date of retirement of the Petitioner. I wonder whether an unseen hand caused the long delay deliberately.? If so who should be held responsible?

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

- (a) at the time of retirement from the public service, disciplinary proceedings were “pending or contemplated; and
- (b) where the explanation offered by the public servant is unsatisfactory.

In the case in hand there was no disciplinary proceedings pending, and the Petitioner is not bound to explain. State takes up the position that disciplinary proceedings were contemplated in view of letter 1R1. There is absolutely no justification to contemplate such disciplinary proceedings and keep it going for a period of over 6 years and issue a charge sheet which was also served on the Petitioner after about 5 months, after petitioner’s retirement from the public service. In the context and circumstances of the case in hand this court takes the view that the Petitioner has been unfairly treated and should not be made to suffer for the lapses on the part of the officials, as stated above. The manner in which Section 12 of the Minutes on Pensions is to be applied is set out in Public Administration Circular 29/90. I will include in this Judgment only the relevant portions in the Circular that concerns both parties.

“In the case of a public officer against whom disciplinary proceedings were pending or contemplated (i.e where a Charge Sheet has not been served) at the time of retirement from the public service.

1.12 Where a *prima facie* case has been established the Disciplinary Authority should issue a Charge Sheet within one month of the date of retirement. The officer should be informed that it is in his own interest to give a full and complete explanation, as he would have no opportunity of offering any further explanation. He should be given two weeks to submit his explanation.

It is very clear that the procedure laid down in PA Circular 29/90, More particularly the above Clause 1:12 had not been observed by the officials. This is a case where a draft charge was not considered and approved by the Secretary to the relevant Ministry/and or the officials in authority, for over 6 Years. It could have been done during the period the Petitioner was, in the government service, if the officials took their job seriously. A slack situation of this nature of those in authority cannot be condoned. If I may incorporate the very words contained in the Judgment delivered by *Dr. Amarasinghe J. in Wilbert Godawela Vs. S.D. Chandradasa and Other 1995 (2) SLR at pg. 341*, the case in hand would be better understood. It states:

That Circular is entitled “Expediting the award of the pensions”. It explains the difficulties experienced by public servants as a result of delays in the payment of pensions caused by the absence of relevant information, and prescribes a two-stage procedure for payment to obviate those difficulties. Paragraph 2.111 states that “a temporary pension of 70% of the full pension will be paid within one month from the date of retirement of an officer so that there will be no break in his income.” It is further provided that. “a full pension will be paid not more than three months after retirement”. The Circular, which was issued under the hand of the Secretary, Ministry of Public Administration, concludes with the following words: “Heads of Departments

and all officers dealing with pensions are kindly requested to treat the question of the rapid disposal of pensions with humanity and sympathy. The persons with which this circular concerns itself are colleagues, who, in the large majority of cases have served in the Public Service honourably and faithfully. We should make every effort to ensure that their last years on this earth are made free from want and financial burden. I do hope, therefore you will give me your utmost co-operation in implementing these proposals...”

What is emphasized above is a rapid disposal of pensions with humanity and sympathy. The words and phrases referred to above leaves no room for delays and lapses, on the part of the officials, though PA Circular 29/90 is a guide to public servants and which has no force of law. As such I do not think in all the facts and circumstances of the case in hand State need to get over the difficulty of an apparent lapse by resorting to a legal maxim of ‘directory’ or ‘mandatory’ which is familiar to interpretation of statutes. The learned Deputy Solicitor General argued that a delay in serving the charge sheet is no bar as words used in para 1:12 of PA Circular 29/90 is directory.

I have to finally observe that in the matter before us the Petitioner was not officially intimated or put on notice of any kind of disciplinary proceedings to be initiated against him at the time he retired from service by operation of law (14.05.2014), and letter 1R2 provides details in this regard. Whatever decision taken by the officials were very late and was done only after Petitioner’s retirement on 14.05.2014. I have discussed above the application of Section 12 of the Minutes on Pensions and the governing Public Administration

Circular 29/90, and the failure of those responsible to adhere to same. It is the view of this court that Petitioner's pension had been withheld unreasonably, and in an arbitrary manner. No doubt he has been subjected to unfair treatment. Section 12 of the Minutes on Pension and the governing Public Administration Circular had not been correctly observed and applied correctly in so far as the Petitioner is concerned. Therefore he has been denied the equal protection of the law guaranteed by the Constitution. I make order setting aside the decisions made against the Petitioner to withhold or reduce his pension, without prejudice of the rights of the state under any law.

Petitioner would be entitled to relief as per sub paragraphs (c), (e) & (g) of the prayer to the petition.

Relief granted as above.

Application allowed with costs.

JUDGE OF THE SUPREME COURT

Priyasath Dep P.C., J.

I agree.

JUDGE OF THE SUPREME COURT

Nalin Perera J.

I agree.

JUDGE OF THE SUPREME COURT

