

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

In the matter of an Application for mandates in the nature of Writs of Certiorari, Mandamus and Prohibition under and in terms of Article 140 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

CA(Writ) Application No: 60/2016

Kithna Parनावithana,
Madola Mawatha,
Walahanduwa.

PETITIONER

Vs.

1. Ceylon Electricity Board.
2. W.D.A.S. Wijayapala,
Chairman, Ceylon Electricity Board.
- 2A. W.B. Ganegala,
Chairman, Ceylon Electricity Board.
- 2C. Rakitha Jayawardana,
Chairman, Ceylon Electricity Board.
3. M.C. Wickramasekara,
General Manager,
Ceylon Electricity Board.
- 3A. Yamuna Malkanthi Samarasinghe,
General Manager,
Ceylon Electricity Board.
- 3B. A.K. Samarasinghe,
General Manager,
Ceylon Electricity Board.
- 3C. S.D.W. Gunawardana,
General Manager,
Ceylon Electricity Board.
4. T.K. Liyanage,
Finance Manager,
Ceylon Electricity Board.

5. K.K.S. Dassanayake,
Deputy General Manager,
Ceylon Electricity Board.
6. J. Wickramasinghe,
Manager (Human Resources).
7. J. Nandakumara,
Deputy General Manager,
(Planning and Development, Distribution
Division No. 3),
Ceylon Electricity Board,
Divisional Office, Ethul Kotte.
8. W.M.M. Ladeesha,
Deputy Finance Manager.

1st – 6th and 8th Respondents at
No. 50, Sir Chittampalam A. Gardiner
Mawatha, P.O. Box 540, Colombo 2.
9. Engineer P.C.C. Perera,
Additional General Manager,
(Distribution Division No. 1),
Ceylon Electricity Board,
No. 1, Fairline Road, Dehiwela.

RESPONDENTS

Before: Mahinda Samayawardhena, J
Arjuna Obeyesekere, J

Counsel: Kamran Aziz for the Petitioner

Dr. Charuka Ekanayake for the Respondents

Argued on: 22nd July 2020

Written Submissions: Tendered on behalf of the Petitioner on 7th June 2019
Tendered on behalf of the Respondents on 3rd March 2020

Decided on: 15th October 2020

Arjuna Obeyesekere, J

The Petitioner had joined the 1st Respondent, Ceylon Electricity Board as an Electrical Superintendent (Grade III) on 15th November 1979. The Petitioner had received several promotions over the years, with the last promotion being to the post of Electrical Engineer (Class II / Grade II). It is admitted that the Petitioner was eligible for the payment of a pension upon retirement in terms of the Pension Fund of the 1st Respondent.

The Petitioner states that in April 2015, Officers attached to the Special Investigations Branch of the 1st Respondent had recorded a statement from the Petitioner relating to his involvement over the supply of electricity to certain premises situated in Hikkaduwa in the year 2008. In his petition, the Petitioner has explained in detail the circumstances surrounding the application made to obtain electricity to the said premises, and his involvement in that regard. The Respondents have explained in the Statement of Objections, their position on the said matter. The necessity for me to consider the facts relating to the supply of electricity to the said premises does not arise, as the determination of the issue before this Court does not require a consideration of the said facts.

The Petitioner states that by a letter dated 25th September 2015 marked 'X33', the Petitioner was informed by the Additional General Manager (Distribution Division No. 4) that he is due to retire on 26th December 2015 on completion of sixty years of age, and *inter alia* to hand over his duties to the officer who would be nominated for such purpose. It is not in dispute that the optional age of retirement of an employee of the 1st Respondent is fifty five years and that the compulsory age of retirement of an employee is sixty years.

Prior to the scheduled date of retirement however, the Petitioner had been issued with a charge sheet dated 8th December 2015 marked 'X34' relating to the aforementioned supply of electricity to the premises in Hikkaduwa. I have examined 'X34' and observe that it contains 9 charges, of which Charge Nos. 1-7 relate to specific incidents relating to the said transaction, while Charge Nos. 8 and 9 reads as follows:

- “8. ඉහත පරිදි කටයුතු කරමින් ලංකා විදුලිබල මණ්ඩලයේ කීර්තිනාමයට හානි ගෙන දෙන අයුරින් ක්‍රියා කිරීම.
9. ඉහත 01 සිට 08 දක්වා වූ වැරදි සියල්ලම හෝ කිපයක් හෝ එකක් සිදුකිරීමෙන් ලංකා විදුලිබල මණ්ඩලය විසින් විදුලි ඉංජිනේරුවරයෙකු වශයෙන් ඔබ වෙත තබා තිබූ විශ්වාසය කඩකිරීම.”

Thus, there is no allegation that the Petitioner has caused any financial loss to the 1st Respondent.

The Petitioner has acknowledged the receipt of 'X34' on 12th December 2015. By letter dated 21st December 2015 marked 'R2', the Petitioner had sought time to respond to the said charge sheet as the incident had occurred in 2008. The Petitioner had thereafter submitted a detailed response to 'X34' by his letter dated 6th January 2016, marked 'X35'. The Petitioner had also informed the 1st Respondent by his letter dated 25th January 2016 marked 'R5' that he has appointed an Officer to appear for him at the inquiry. The 1st Respondent had thereafter issued the Petitioner with an amended Charge Sheet dated 11th February 2016 marked 'X36'. This too has been acknowledged by the Petitioner by his letter dated 23rd February 2016 marked 'R7', and by which the Petitioner had requested for 14 days to respond to 'X36'.

The Respondents have stated that an Inquiry Officer was appointed by letter dated 17th December 2015 marked 'R3' with specific instructions to conclude the inquiry within three months. The inquiry had commenced on 27th January 2016 with the Petitioner pleading not guilty to all the charges preferred against him. The inquiry had thereafter been re-fixed for 24th February 2016.

While the above developments were taking place relating to the conducting of a disciplinary inquiry, the Petitioner had made several requests that he be paid his pension. The Petitioner states that he did not receive an acknowledgement to his request, nor was the pension paid to him.

The Petitioner filed this application on 26th February 2016, seeking *inter alia* the following relief:

- a) A Writ of Certiorari quashing the decision of the 1st Respondent to issue the Petitioner the Charge Sheets marked 'X34' and 'X36';
- b) A Writ of Prohibition restraining the 1st Respondent from proceeding with the disciplinary inquiry;
- c) A Writ of Certiorari quashing the decision of the 1st Respondent to suspend the payment of the pension due to the Petitioner;
- d) A Writ of Mandamus directing the 1st Respondent to pay the pension to the Petitioner.

The learned Counsel for the Petitioner has presented two arguments before this Court.

His first argument is that the 'Rules of Disciplinary Procedure' of the 1st Respondent marked 'X39', which contain detailed provisions relating to the conducting of a disciplinary inquiry against an employee of the 1st Respondent, does not provide for the conducting of a disciplinary inquiry against an Officer who has retired from service. He therefore submitted that the decision of the 1st Respondent to conduct disciplinary proceedings against the Petitioner is *ultra vires* the powers of the 1st Respondent.

I shall commence by considering the Disciplinary Rules 'X39'. Rule 1.3 thereof provides that, '*An act of misconduct or a lapse **by an employee** calling for punishment in any form should be dealt with under these Rules,*'. It is admitted that the Petitioner reached the age of compulsory retirement on 26th December 2015. It is also admitted that the Petitioner was served with the charge sheet 'X34' on 12th December 2015 while he was still serving as an employee of the 1st Respondent. As the allegation of misconduct relates to a period during which the Petitioner was an employee of the 1st Respondent, and as the Petitioner was an employee of the 1st Respondent at the time the charge sheet was issued (i.e. 12th December 2015), I am of the view that the 1st Respondent can initiate disciplinary proceedings against the Petitioner in terms of the procedure laid down in 'X39'.

The next question that arises is whether an inquiry that commenced prior to the retirement of an employee can be proceeded with, after the retirement of the said employee. The learned Counsel for the Petitioner has submitted that 'X39' does not contain specific provisions in this regard, and that:

- (a) The 1st Respondent cannot proceed with any disciplinary inquiry against the Petitioner after his retirement; and
- (b) The 1st Respondent cannot impose any punishment against the Petitioner as he is no longer in service of the 1st Respondent.

I have examined 'X39' and observe that it contains detailed provisions relating to the conducting of disciplinary inquiries against an employee, as submitted by the learned Counsel for the Petitioner. Section 19 thereof reads as follows:

"19.1 An employee against whom disciplinary proceedings are pending or contemplated should not be granted permission to leave the Island without the approval of the General Manager.

19.2 If an employee under interdiction leaves the Island without permission having been obtained (and) this fact is established, his services will be terminated and the disciplinary proceedings shall cease.

19.3 If an employee resigns whilst disciplinary proceedings for offences under Schedule 'A' are pending, he will be deemed to have been dismissed from service."

Thus, even though Section 19 is titled, '**Retirement, resignation and permission to leave the Island when disciplinary proceedings are pending or contemplated**', Section 19 does not specifically provide for the situation that has arisen. The fact that an employee against whom disciplinary proceedings are pending or contemplated cannot leave the country, and the fact that such an employee cannot resign from his employment is an *indication* that the 1st Respondent did not contemplate permitting an employee against whom charges were pending to retire from service. Hence, the title of the said Section. I am, however not inclined to attach legality to an act, on *indications*.

It would therefore have been helpful if Section 19 contained provisions that:

- (a) An inquiry commenced against an employee prior to retirement may continue notwithstanding the retirement of such employee;
- (b) The retirement of an employee against whom an inquiry is pending or contemplated will be accepted subject to the outcome of the inquiry or proposed inquiry;
- (c) The payment of pension to such an employee would be subject to the outcome of the inquiry or proposed inquiry.

As noted, 'X39' does not contain any of the above provisions. The Respondents have not stated that the omission to include such provisions in 'X39' was due to an oversight at the time 'X39' was prepared, nor have the Respondents stated that the intention was that an employee against whom disciplinary proceedings are pending or contemplated must face such disciplinary inquiry, after retirement.

The Respondents have instead submitted that in the event of a lacuna in the procedure set out in 'X39', resort could be had to the provisions of the Establishments Code. I shall now consider if the 1st Respondent can in fact resort to the provisions of the Establishments Code, and if so, what the position would be, under the Establishments Code.

X39' has been issued in June 1985. The preamble to the Rules reads as follows:

"In the exercise of disciplinary control of CEB employees the Board has hitherto been guided by the Rules of Disciplinary Procedure laid down for Public Officers in the Government Establishments Code, subject to such changes, modifications etc., as were considered necessary.

The Rules of Disciplinary Procedure for the CEB have now been formulated, based broadly on the provisions of the Establishments Code and modified to suit the needs of the CEB. The Board has approved these Rules of Disciplinary

Procedure and the Delegation of Disciplinary Powers laid down therein, and has granted authority for the adoption of these Rules from 1st July 1985.”

Rule 1.3 of 'X39' specifies that '*Any matter not covered in these Rules should be dealt with in accordance with **any general or specific orders** that may be made by the Board in the context of such cases.*'

It appears to me from the preamble and Rule 1.3 of 'X39' that the 1st Respondent will not be able to resort to the provisions of the Establishments Code in the event of any lacuna in the procedure. The right to address any lacuna has been vested with the Board of Directors of the 1st Respondent. This position is supported by a Circular issued by the General Manager of the 1st Respondent in October 2016 marked 'X42', filed with the Counter Affidavit of the Petitioner, stating that it is incorrect to apply the provisions of the Establishments Code to employees of the 1st Respondent. Thus, I cannot agree with the learned Senior State Counsel for the 1st Respondent that the provisions of the Establishments Code can be made use of to fill any lacuna in the procedure set out in 'X39'.

Assuming the 1st Respondent could have resorted to the provisions of the Establishments Code, could the 1st Respondent have proceeded with the disciplinary inquiry against the Petitioner? Or, would the position have been different? The answer to these two questions is found in Chapter XLVIII of the Establishments Code, which I shall now examine.

Section 36 of Chapter XLVIII is titled, '*Disciplinary Procedure against an Officer reaching the optional age of retirement*'. The provisions of Section 36 which are relevant to this application are set out below:

“36:2 When a public officer against whom a formal disciplinary inquiry is in progress requests that he be allowed to retire on reaching the optional age of retirement or his extension of service has been refused on other grounds or when the officer reaches the compulsory age of retirement, he should be retired subject to Section 12 of the Pensions Minute.

- 36:4 *The preliminary investigation, work in connection with the disciplinary proceedings and the formal disciplinary inquiry against an officer retired subject to Section 12 of the Pensions Minute should be held and concluded by the Disciplinary Authority irrespective of the retirement of the officer. In such an instance, the Disciplinary Authority should be guided by the provisions of this Code.*
- 36:5 *An officer retired subject to Section 12 of the Pensions Minute is bound to participate in the preliminary investigation or formal disciplinary inquiry held against him, furnish information and assist in the completion of such task with the least possible delay.*
- 36:7 *Where the Disciplinary Authority finds the officer guilty of one, some or all of the charges according to the material disclosed at the formal disciplinary inquiry, he should, depending on the nature of the charge or charges of which the officer is found guilty, send his observations and recommendations, without delay, whether the officer should be deprived of his full pension, gratuity and other allowances payable to him or whether a certain percentage thereof should be deducted, together with the charge sheet, report of the Inquiry and all other relevant documents to the Secretary in charge of the subject of Public Administration.”*

Section 12 of the Minutes on Pensions reads as follows:

- “(1) 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 ... may either withhold or reduce any pension, gratuity or other allowance payable to such public servant under these Minutes.*
- (2) 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 those findings, the Permanent Secretary, Ministry of Public Administration ... may either withhold or reduce any pension, gratuity or other allowance payable or awarded to such officer under these Minutes."

The cumulative effect of Section 36 of Chapter XLVIII of the Establishments Code and Section 12 of the Minutes on Pensions is that while disciplinary action can be proceeded with against an employee after his retirement, if disciplinary action is to be taken against an employee after his or her retirement, such retirement should be accepted subject to Section 12. This, in my view, is the key factor that would determine:

- a) If disciplinary action can be proceeded with against an employee after retirement;
- b) Whether the payment of pension can be withheld, pending the outcome of the disciplinary inquiry.

This being the position under the Establishments Code, what should the 1st Respondent have done when confronted with the imminent retirement of the Petitioner while disciplinary proceedings were underway? In my view, the answer to this question lies in Rule 1.3 of 'X39' in terms of which the Board can take a decision in respect of a matter not covered by 'X39' as the circumstances of a particular case may warrant.

The 1st Respondent cannot prevent an employee from retiring on completion of the maximum age of employment. As already noted, 'X39' does not contain specific provision to proceed with a disciplinary inquiry after retirement of an employee. However, the fact that the Petitioner was due to retire from service on 26th December 2015 was known to the 1st Respondent. Hence, the letter dated 25th September 2015 'X33' signed by the Additional General Manager (Distribution Division No. 4). It is the same Additional General Manager (Distribution Division No. 4) that issued the charge sheet 'X34'. The fact that a charge sheet had been served on the Petitioner should have been brought to the notice of the relevant authority

within the 1st Respondent, so that an appropriate decision whether to accept the retirement subject to the outcome of the inquiry could have been taken. However, due to the negligence or otherwise of the officials of the 1st Respondent, such a course of action has not been adopted.

If the Board of Directors of the 1st Respondent was apprised of such fact, I am of the view that the Board of Directors, acting in terms of Rule 1.3 of 'X39' could have taken a decision whether to continue the disciplinary proceedings already commenced against the Petitioner, notwithstanding the Petitioner reaching the maximum age of employment. If an affirmative decision had been taken, that would mean that the 1st Respondent had permitted the retirement of the Petitioner, subject to the outcome of the inquiry.

The Respondents have not placed before this Court any such decision of the Board of Directors of the 1st Respondent. In paragraphs 52, 53, 56, 60 (c), (f) and (g) of the petition, the Petitioner has specifically stated that he retired from service with effect from 26th December 2015. Except for a general denial of the said paragraphs,¹ the 1st Respondent has not claimed in its Statement of Objections that the retirement was accepted subject to the outcome of the inquiry.

Thus, even if the Establishments Code applied, the 1st Respondent could not have proceeded with the disciplinary inquiry against the Petitioner in the absence of a decision that the retirement of the Petitioner has been accepted subject to the outcome of an inquiry, and the Petitioner had been informed of such fact. If, on the other hand, such a decision was taken, that decision would not have been illegal as the 1st Respondent has every right to take decisions with regard to its employees.

In these circumstances, I am of the view that the decision of the 1st Respondent to proceed with the inquiry and to withhold the pension of the Petitioner is *ultra vires* the powers of the 1st Respondent vis-à-vis 'X39'.

¹ Vide paragraphs 3, 6 and 26 of the Statement of Objections dated 10th August 2017. I have disregarded the Statement of Objections dated 22nd November 2016, which had admitted paragraphs 53 and 56 of the petition.

The second argument of the learned Counsel for the Petitioner was that the Pension Fund Rules marked 'P39' does not provide for the suspension of the payment of the pension, and therefore the purported decision of the 1st Respondent to withhold the pension pending the outcome of the disciplinary inquiry is *ultra vires* the powers of the 1st Respondent. The necessity for me to consider this argument does not arise in view of the conclusion reached by me in respect of the first argument. However, I wish to give my mind to this issue, although the issue is now academic.

It is an accepted fact that an employee does not have an entitlement to the payment of a pension, but is only eligible to receive a pension, provided he has served his employer honestly, efficiently and with dedication. The 1st Respondent has established its own Pensions Fund in terms of Section 12(j) of the Ceylon Electricity Board Act No. 17 of 1969, as amended. The Rules relating to the Fund have been published in Extraordinary Gazette No. 1321/18 dated 31st December 2003 in the form of regulations referred to as the 'Ceylon Electricity Board (Pension Fund) Regulations, 2003.' I have examined the said Rules, marked 'X37', and observe that an employee becomes eligible for pension only upon reaching the optional age of retirement, or thereafter.

Rule 25 of 'X37' reads as follows:

"25. Retirement for purpose of pension:

25.1 For the purpose of a Pension award retirement means,

- (1) Retirement on reaching the optional age of retirement at 55 years or thereafter.*
- (2) Retirement on being found unfit for service by a duly constituted Government Medical Board, subject to each such case being approved by the Committee consideration the Medical Board findings with regard to the illness (sic).*

*25.2 Retirement on account of the following shall **not be considered** for grant of a Pension award.*

- (1) *Compulsory retirement for offences under Schedule “a” in accordance with Section 18 of the Rules of Disciplinary Procedure.*
- (2) *Retirement for General Inefficiency or incompetence in accordance with Section 18 of the Rules of Disciplinary Procedure.*
- (3) *Compulsory retirement as a merciful alternative to dismissal by the Appellate authority in accordance with Section 11.5 of the Rules of Disciplinary Procedure.”*

Thus, an employee who has been:

- a) Compulsorily retired in terms of Section 17 of 'X39'; or
- b) Retired for general inefficiency or incompetence in terms of Section 18 of 'X39';
or
- c) Compulsorily retired as an alternative to dismissal in terms of Rule 11.5 of 'X39',

is not eligible to the payment of a pension.

The above provisions confirm that payment of the pension is not only for long service but is dependent on efficient and honest service. Thus, even in the absence of any specific provision in 'X37', I am of the view that the 1st Respondent had every right to refrain from affording the Petitioner a right to a pension where a disciplinary inquiry is pending at the time of retirement, **provided** the retirement had been accepted subject to the outcome of the disciplinary inquiry. In the absence of any such decision, the withholding of the payment of the pension is illegal, and is liable to be quashed by a Writ of Certiorari.

In the above circumstances, I am of the view that proceeding with the disciplinary inquiry against the Petitioner and withholding the pension due to the Petitioner is *ultra vires* the powers of the 1st Respondent, and unreasonable. I accordingly issue:

- (a) A Writ of Prohibition restraining the 1st Respondent from proceeding with the disciplinary inquiry against the Petitioner;

- (b) A Writ of Certiorari quashing the decision of the 1st Respondent to suspend the payment of the pension due to the Petitioner; and
- (c) A Writ of Mandamus directing the 1st Respondent to pay the Petitioner his pension in accordance with the Pension Fund Rules 'X37'.

I make no order with regard to costs.

Judge of the Court of Appeal

Mahinda Samayawardhena, J

I agree

Judge of the Court of Appeal