

**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 Writ of *Certiorari and Mandamus*  
under Article 140 of the Constitution of the  
Democratic Socialist Republic of Sri Lanka**

A.S. Ariyaratne,  
Ulu Poranuwa,  
Gilimale.

**PETITIONER**

**CA/ WRIT/140/ 2014**

**Vs,**

1. National Savings Bank,  
“Savings House”  
No. 255, Galle Road,  
Colombo 03.
2. Aswin de Silva, Chirman,
3. K.K.M. Siriwardena-Director,  
General Department of Fiscal Policy,
4. Ajith Pathirana, Director,
5. Bradley Emerson, Director,
6. Suranga Naullage, Director,
7. D.L.P.R. Abeyrathne, Postmaster General  
(Ex-Office Director)

8. Wasantha Batagoda, Director,

2<sup>nd</sup> to 8<sup>th</sup> Respondents, all of  
National Savings Bank,  
“Savings House”  
No. 255, Galle Road,  
Colombo 03.

9. H.M. Hennayake Bandara,  
General Manager,

10. Assistant General Manager,  
(Human Resources Development),  
9<sup>th</sup> to 10<sup>th</sup> Respondents both of  
National Savings Bank,  
“Savings House”  
No. 255, Galle Road,  
Colombo 03.

## RESPONDENTS

**Before: Vijith K. Malalgoda PC J (P/CA) &  
H.C.J. Madawala J**

**Counsel: Sanjeewa Kaluarachchi for the Petitioner  
Anusha Samaranayake SSC for the Respondents**

Argued On: 30.06.2015, 13.07.2015

Written Submission On: 31.08.2015, 08.09.2015

**Judgment On: 06.11.2015**

## Order

### **Vijith K. Malalgoda PC J**

The Petitioner who is a retired employee of the National Savings Bank has come before this court seeking inter alia,

- b. Grant and issue a mandate in the nature of a *Writ of Certiorari* quashing the purported charge sheet dated 11.04.2014 (P-14) issued to the Petitioner by the 1<sup>st</sup> and/or 10<sup>th</sup> Respondent
- c. Grant and issue a mandate in the nature of *Writ of Prohibition* Prohibiting the 1<sup>st</sup> Respondent and/or any other Respondent and/or any other authority from proceeding with the disciplinary inquiry initialed/ contemplated by the purported charge sheet dated 11.04.2014 (P-14) issued to the Petitioner by the 1<sup>st</sup> and/or the 10<sup>th</sup> Respondent
- d. Grant and issue a mandate in the nature of *Writ of Prohibition* Prohibiting the 1<sup>st</sup> Respondent and/or any other Respondent and/or other authority from taking any further disciplinary action against the Petitioner in pursuance of the purported charge sheet dated 11.04.2014 (P-14)
- e. Grant and issue a mandate in the nature of a *Writ of Mandamus* compelling the 1<sup>st</sup> Respondent and/or any other Respondent and/or any other authority to release the Petitioner's retirement benefits forthwith

Petitioner's position before this court was that he served in the National Savings Bank (NSB) for 33 years and upon reaching the compulsory age of retirement he duly retired with effect from 26.08.2013. At that time he was serving as the Manager of the NSB Ratnapura Branch.

Petitioner has further submitted that few days prior to his retirement, he found that a fraudulent withdrawal of Rs. 500000/- had been made from customers account. Immediately thereafter, the Petitioner informed the Audit Department of the NSB of the said fraudulent withdrawal and requested to

conduct an inquiry and consequent to the said complaint, Audit Department conducted an inquiry into the matter and the Petitioner assisted the said investigation.

According to the Petitioner, two days after his retirement i.e. on or around 28.08.2013 he duly handed over the Ratnapura Branch of NSB to his successor namely one D.S. Daluwatte, and submitted that during the handing over process it was revealed that a file containing several "fixed Deposit Certificates" of a deceased customer namely K.K. Ramachandran could not be found. When inquiring in to this it was revealed that the said file had gone missing since 29.07.2013. The said matter was immediately informed to the area manager and the subsequent inquiries revealed that on 23.08.2013 the relevant fixed deposit had been wrongfully transferred to an account bearing No.100100687219. By his letter dated 30.08.2013 requested the Zonal Manager of the NSB to call for an inquiry into the said matter by the Audit Department.

Petitioner learnt that after an inquiry held by the Audit Department with regard to the Fixed Deposit issue, an employee of the Ratnapura Branch namely Athula Pushpakumara had been interdicted and several others were transferred out of the branch but denies making any statement to the Audit Department in the said inquiry (paragraph 8 of the Petition).

Since the 1<sup>st</sup> Respondent bank failed to grant his retirement benefits, the Petitioner has written to the 10<sup>th</sup> Respondent requesting his retirement benefits by letter dated 11.11.2013 (P-8) and thereafter a reminder was sent to the said letter by letter dated 04.01.2014 (P-9) and a further appeal was lodged by the Petitioner to the 9<sup>th</sup> Respondent on 06.02.2014. However the 10<sup>th</sup> Respondent issued the impugned document P-14 on the Petitioner on 11.04.2014.

The Petitioner's argument before this court was that he retired from his service from NSB on 26.08.2013 on completion of 60 years by operation of law. In support of his contention he has produced marked P-4 the authority granted by the Bank for his retirement and also drew our attention to the decision in *Wilbert Godawela V. Chandrasena and Others 1995 (2) Sri LR 338*.

Petitioner further argued that the Respondents have never informed him that his retirement was subject to Rule 21.3 of the disciplinary proceedings when Petitioner wrote to the 1<sup>st</sup> Respondent asking for his retirement benefits. (P-8 and P-9) The 10<sup>th</sup> Respondent informed him by letter dated 17.01.2014 that his request cannot be granted since an inquiry was pending with regard to a fraud taken place while he was in service as the Manager Ratnapura Branch (P-10).

According to the Petitioner the Respondents have served a charge sheet on him (P-14) 7 months after his retirement and therefore he argued that no disciplinary action could be initiated against him since he was retired and was no longer an employee of the NSB.

The Respondents have taken up the following position before this court,

- a. That in view of the facts and circumstances of these matter disciplinary proceedings had been 'contemplated' against the Petitioner at the time of his retirement, in terms of the rules of the Bank.
- b. The Petitioner has by his conduct acquiesced/ consented to his retirement being subject to disciplinary proceeding and is estopped from challenging the same by way of this application

The Learned Senior Counsel appearing for the Respondents argued that in view of the facts and circumstances of this case, it is understood that the disciplinary proceedings had been contemplated under rule 21.3 of the NSB Rules in Disciplinary Management. The said rule reads as follows;

21.3 if an employee reaches the age of retirement while disciplinary proceeding are contemplated or are in progress against him, his retirement will be made subject to such disciplinary action. A disciplinary order that will be made subsequently would be in the nature of a cut in the pension or in the gratuity, where necessary.

This court is of the view that unlike in a case of disciplinary proceedings are in progress, a situation where disciplinary proceedings are contemplated, has to be understood by careful consideration of facts and circumstances of the case

In support of the above contention the Respondents have relied on the decision in *Peiris V. Wijesuriya Director of Irrigation and Others 1999 (1) Sri LR 295*

This court observes that, in the said case the Petitioner was a storekeeper in the Irrigation Department incharge of Rambawewa Stores. When the Petitioner complaint of the loss of the stock book, the stores in his charge were sealed and a stock verification was conducted and a shortage amounts to Rs. 373, 958.41 were reported. The Petitioner was interdicted with effect from 29<sup>th</sup> September 1986. The Petitioner reached the age of 55 years on 7<sup>th</sup> August 1987 and was retired from the public service by letter dated 20<sup>th</sup> November 1987 The Additional Director of Irrigation informed the Petitioner that the Petitioner had been retired subject to Rule 12 of the minutes of Pension.

Rule 12 (3) of the minutes of Pension 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 unsatisfactory by the competent authority the (relevant authority) may either withhold or reduce any pension, gratuity or other allowances payable to such Public Servant under these minutes.”

It was argued in the said case that “not only was there inquiry but that such an inquiry was not contemplate and that therefore retirement under Rule 12 was illegal, unwarranted, mala fide and in excess of the power of the Respondents.

Amarasinghe (J) observed that, “stock verifications had revealed certain shortages and the Petitioner had been interdicted in September 1986. There were no pending disciplinary proceedings but I am unable to

accept the view that the disciplinary proceedings were not “contemplated”. What was the purpose of the long drawn-out investigations except for the purpose of precisely ascertaining the losses and fixing responsibility for such losses? This case was quite unlike Wilbert Godawela’s case which Learned Counsel for the Petitioner cited, in that case there were no disciplinary proceedings pending at the time of retirement, no was such proceeding contemplated.”

When facts and circumstances of the present case are considered I observe that the Petitioner himself had complained of a fraudulent withdrawal of Rs. 500000/- few days prior to his retirement to the Audit Department. Two days after his date of retirement, i.e. on 28.08.2013 while he was handing over his duty to his successor, observed a loss of a file containing several Fixed Deposit Certificates of a deceased customer and immediately informed to the area manager of the said fact.

Unlike in the case of Peiris V. Wijesuriya, the Petitioner was working as the Branch Manager until his date of retirement, without any investigation pending against him. He retired on 26.08.2013 by reaching his retiring age and thereby operation of Law as decided in Wilbert Godawela’s case.

I further observe a clear distinction between the present case and the case of Peiris V. Wijesuriya. Unlike in the case of Peiris V Wijesuriya, the alleged fraudulent acts were either reported few days prior to the retirement of the Petitioner or few days after the date of retirement. By that time the Petitioner was served with his pension letters and he was contemplating to go on retirement with all his pension benefits. The Respondents did not communicate with the Petitioner until he wrote to the Respondents in November 2013 and January 2014 asking for his pension benefits.

The Respondents at no stage prior to January 2014 or after that informed the Petitioner the suspension or cancellation of P- 4 or disciplinary proceedings are contemplated under 21.3 of the NSB Rules in Disciplinary Management.

Therefore I cannot agree with the contention of the Learned Senior State Counsel, that the facts and circumstances of this case reveals that the disciplinary proceeding had been contemplated against the Petitioner.

Respondents have further argued that the Petitioner by his conduct acquiescence/ consented to his retirement being subject to disciplinary proceedings and is estopped from challenging the same by way of this application.

In support of the above contention the Respondents submitted that the Petitioner participated at the investigation which commenced a short while later to his retirement on 26.08.2013, i.e. on 11.09.2013 and voluntarily made several statements which was produced marked 2R3, 2R5, 2R6 and 2R7.

The Respondents have relied in the case of *K. Nagalingam V. Lakshman de Mel 78 NLR 231* on this objection.

In the said case the Petitioner who joined the Employers Federation at the age of 48 objected for his retirement at the age of 60 since the letter of appointment did not stipulate any retiring age. When the Respondent Federation appealed to the Commissioner of Labour under the provisions of Termination of Employment of Workmen (Special Provisions) Act, an inquiry was held before the Commissioner of Labour. The said inquiry which was commenced in September 1973 went on till March 1974 and finally approval was granted to terminate his service with effect from 31<sup>st</sup> March 1974. When the Petitioner moved court to quash the above proceedings, Sharvananda J (As he was then) observing the fact that, “the Petitioner having participated in the prolonged proceedings without any objections and having taken the chance of the final outcome of the proceedings, is precluded from raising any objection to the jurisdiction of the Commissioner of Labour” and finally concluded that , “the Petitioner’s right, if any, to Certiorari has in the circumstances, been lost by his acquiescence or implied waiver.”



In the case of *State of Punjab V. Davender Pal Singh Bhullar AIR 2012 SC 364* it was held that, acquiescence being a principle of equity must be made applicable where a party knowing all the facts bias, etc surrenders to the authority of the court/ tribunal without raising any objection. Inaction in every case does not lead to an inference of implied consent or acquiescence. Thus the court has to examine the facts and circumstances in an individual case.

As admitted in paragraph 9 and 10 (c) of the affidavit of the 2<sup>nd</sup> Respondent the Petitioner has reported the two incidents in question by his letters dated 26.08.2013 and 30.08.2013 requesting the Audit Department to conduct investigations with regard to these matters. When an investigation is commenced, as the manager who was functioning at the time the said frauds taken place and also as the complainant the Petitioner was bound to make a statement and /or statements. This court observes that the said statements were recorded during an investigation and not during a disciplinary inquiry against him. The disciplinary inquiry as observed is the case of *Nagalingam V. Lakshman de Mel* only commences with the serving of the charge sheet P-14 to which the Petitioner had objected and had come before this court.

I therefore conclude that the Petitioner is entitled to the relief claimed in paragraphs (b), (c), (d), (e) and (i) of his Petition and make order granting the relief prayed for in paragraphs (b), (c), (d), and (e) of the Petition with cost to be paid to the Petitioner fixed at Rs. 50000/-

**PRESIDENT OF THE COURT OF APPEAL**

**H.C.J. Madawala**

I agree,

**JUDGE OF THE COURT OF APPEAL**