

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

CA (Writ) Application No: 257/12

Sriya Hettiarahchi,
146/4,
Ukwatta,
Gintota

Petitioner

Vs.

1. Lal Samarasekara, Divisional Secretary,
Divisional Secretariat,
Four Gravets,
Galle.

2. N. Abeywickrama, Director General of Pensions,
Maligawatte Secretariat,
Maligawatte,
Colombo 10

3. T.M.L.C Senaratne, The Secretary,
Public Service Commission,
No 177,
Nawala Road,
Narahenpita,
Colombo 05

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

Respondents

C.A. (Writ) Application No. 257/2012

BEFORE : A.H.M.D. NAWAZ J and
E.A.G.R. AMARASEKARA J

COUNSEL : J.C. Weliamuna PC with Sulakshana Senanayake for
the Petitioner
Chaya Sri Nammuni SC for the Respondents

**ARGUED AND
DECIDED ON** : 03.08.2017

A.H.M.D. NAWAZ J.

Both Counsel were heard on their respective cases. Filing an application for judicial review by way of a petition dated 27.08.2012, the petitioner states that she joined the government service in 1979 and rose to the position of an Accountant, Grade I and at the time of her retirement on 25.04.2012 she was serving as an Accountant, Grade I at the Divisional Secretariat, Galle. Her complaint before this Court is that by a letter dated 18.04.2012 marked as 'P1', she was informed on 18.04.2012 that a disciplinary inquiry had been begun against her and therefore she was placed on retirement in terms of Section 12 (1) of the Minutes on Pension. This Court observes that by 18.04.2012, no charge sheet had been issued to the petitioner and therefore no disciplinary inquiry could have commenced against her.

The Court observes that 'P1' has been issued without any basis as Section 12(1) of the Minutes on Pension alludes to a *pending or contemplated disciplinary proceedings*. This decision has been communicated to the petitioner by the Divisional Secretary of the Four Gravets, Galle. In his letter the Divisional Secretary calls in aid a letter issued by the Public Service Commission.

This Court takes the view that a public servant could be retired under Section 12 (1) of the Minutes on Pension only if certain conditions are satisfied:

- 1) There has to be an explanation tendered by a public servant in response to a communication made to that public servant in respect of her negligence, irregularity or misconduct.
- 2) The competent authority must find that the explanation is unsatisfactory.

These ingredients have to be satisfied before a decision is taken to retire a public officer in terms of Section 12 (1) of the Minutes on Pension. The only letters that are relied upon, in the statement of objections to the petition, to justify a retirement under Section 12 of the Minutes on Pension, seem to be 3R3, 3R4, 3R5 and 3R6. If one takes these letters in their chronological order, 3R6 is a recommendation to the Secretary to the Treasury as far back as 19.11.2009 to the effect that subsequent to a preliminary investigation two officers could be proceeded against at a disciplinary inquiry. This letter dated 19.11.2009 (3R6) also attaches a proposed charge sheet against the two officers named in this letter. One of the two officers named in this letter

happens to be the petitioner and this Court takes the view this letter could not be taken to be a contemplation of an inquiry against the petitioner by a competent authority. At best it remains a mere recommendation but the precedent step of a letter calling for an explanation does not seem to have been taken. Section 12 (1) of the Minutes on Pension is quite explicit in that it calls for a decision by the competent authority to the effect that the explanation tendered by a public servant is unsatisfactory. There is no evidence before this Court that an explanation was called for from this petitioner or a finding was reached that any explanation tendered by the petitioner was found to be unsatisfactory. In addition this particular letter (3R6) has not been written by the competent authority. Therefore, 3R6 cannot form the basis for a Section 12 decision.

3R4 dated 09.02.2012

This is a letter written on 09.02.2012 by the Deputy Secretary to the Treasury, to the Secretary to the Public Service Commission. In this communication one Mr. P.A. Abeysekera, Deputy Secretary to the Treasury recommends that the petitioner be placed on a Section 12 retirement. However, there is no evidence tendered to this Court to demonstrate that before this recommendation was addressed, the competent authority found any explanation tendered by the petitioner unsatisfactory. In the circumstances, the Court takes the view that the letter 3R4 cannot form the basis for a Section 12 decision.

3R5 dated 13.03.2012-letter from the Secretary, Public Service Commission

Neither can the letter marked 3R5 and dated 13.3.2012 form the basis for a Section 12 order. This is a letter written by the Secretary, Public Service Commission advising the Secretary to the Treasury to retire the Petitioner under the provisions of Section 12 of the Minutes on Pension. It appears that this letter does not emphasize the fact that the petitioner's explanation if any was ever considered before the advice was tendered.

The Court finds the letter marked as 3R3 to be of no consequence as that letter too does not satisfy the requirements necessary to place a public officer on Section 12 retirement. The learned President's Counsel Mr. Chrishantha Weliamuna cites the case of **Wilbert Godawela vs. S.D. Chandradasa and others** (1995) 2 Sri.LR 338 where His Lordship Amarasinghe J (with Their Lordships Mark Fernando J and Sarath N. Silva J agreeing) has adverted to the requisites that have to be followed before a public officer could be placed on a Section 12 (1) retirement. This judgment is quite eloquent of the requirement that a pension could, in terms of Section 12 (1) of the Minutes on Pension be withheld or reduced only where;

- 1) at the time of his retirement from public service disciplinary proceedings were pending or contemplated, and
- 2) where the explanation tendered by the public servant concerned is considered to be unsatisfactory.

This Court emphasizes the fact that before a competent authority proceeds to visit a public servant with sanctions of this nature which impact on

the economic benefits that a long serving public servant may have earned at the end of his carrier, both the aforesaid requirements that have been referred to by the Supreme Court have to exist. In other words, the requirements of a pending or contemplated inquiry and an unsatisfactory explanation are conjunctive and not disjunctive. None of these two requirements were in existence when the impugned document 'P1' dated 18.04.2012 was addressed to the petitioner. The petition to this Court is dated 27th August 2012. Therefore, having regard to the fact that the doctrine of *ultra vires* is the pillar of administrative justice this Court has to jealously guard against abuse of powers that have been enacted for the benefit of the citizens of this country. In the circumstances, this Court holds that the respondents have acted *ultra vires* the powers that have been vested with them in order to retire this public servant in terms of Section 12 (1) of the Minutes on Pension. No preconditions necessary to the exercise of the power given in Section 12 (1) of the Minutes on Pension have existed and no attempt has been shown that such prerequisites as are stipulated by law existed before a decision was taken to retire the petitioner under Section 12 (1) of the Minutes on Pension.

In the circumstances, this Court proceeds to issue a writ of certiorari quashing the document marked 'P1'. Therefore, the decision to stop payment of pension and gratuity due to the petitioner on her retirement effective from 25.04.2012 is quashed. Since this Court has found that the Section 12 retirement is *ultra vires* the powers vested in the functionaries, this Court holds that any further sanctions on the petitioner by way of a disciplinary inquiry would be unwarranted in the circumstances.

The petitioner would be entitled to all the pension benefits and gratuity. This Court also states that any disciplinary inquiry would be unwarranted in view of the fact that there is no charge sheet that could be served on this petitioner.

JUDGE OF THE COURT OF APPEAL

E.A.G.R. AMARASEKARA J

I agree.

JUDGE OF THE COURT OF APPEAL

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