

**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 and Mandamus in terms of Article 140 of the Constitution.

1. T. Kaliugavarathan  
Vavunath Thambai Veethi, Kurumpasiddy.  
Pension No. 01-805244
2. P. Mahendranathan  
Sabapathipillai Veethi, Uduvil East, Chunnakam.  
Pension No. 01-805142
3. N. Vettivelu  
Nillani, Kollankaladdy, Thellipillai.  
Pension No. 01-804571
4. T. Sivarajah  
Dutch Road, Periyavillai, Ilavalai.  
Pension No. 01-805398.
5. V. Chandrakumar  
Crazer Lane, Tellipalai.  
Pension No. 01-805141
6. V. Thangarajah  
Varuthalai Lane, Tellipalai.  
Pension No. 01-804983
7. K. S. Sithravel (Dead)  
Mrs. Sithravel  
Maans School Veethi, Chunnakam.  
Pension No. 01-804939
8. R. Balakrishnan  
V. C. Road, Myliddy North, Kankesanthurai.  
Pension No. 01-805500

**Case No. C. A. (Writ) Application 216/2012**

9. V. Lawrence  
Manipay Road, Urumprai.  
Pension No. 01-805380
10. V. Nageswaran  
Neervely Centre, Neervely.  
Pension No. 01-804963
11. V. Selvarajah  
Amman Kovilady, Karanavai East, Karaveddy.  
Pension No. 01-805258
12. V. Kiritharan  
Kalvalavu, Tellipalai East, Tellipalai.  
Pension No. 01-805191
13. S. Varapasatham  
25, Manalatharai Lane, Kandarmadam, Jaffna.  
Pension No. 01-805386
14. K. Krishnasamy  
Thiruvathannai, Emayanan North, Udupiddy.  
Pension No. 01-805395

**Petitioners**

**Vs.**

1. Valikamam North Mallakam  
Pradeshiya Sabha, Mallakam.
2. Ceylon Electricity Board  
No. 50, Sir Chittampalam A. Gardinar Mawatha,  
Colombo 02.
3. Athaudage Jagath Dias Dharmapala  
Director General of Pension,  
New Secretariat Building,  
Maligawatta, Colombo 10.

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

**Respondents**

**Before:** Janak De Silva J.

N. Bandula Karunarathna J.

**Counsel:**

G. Jeyakumar for the Petitioner

Milinda Gunathilake SDSG for the Respondents

**Written Submissions tendered on:**

Petitioner on 01.07.2019

Respondents on 05.07.2019

**Argued on:** 10.07.2019

**Decided on:** 31.07.2019

**Janak De Silva J.**

The Petitioners are former employees of the 1<sup>st</sup> Respondent, Vallikamam North Mallakam Pradeshiya Sabha and employed in the electrical undertaking carried on by the 1<sup>st</sup> Respondent. This undertaking was vested in the 2<sup>nd</sup> Respondent Ceylon Electricity Board (CEB) at which point the Petitioners were absorbed as employees by the 2<sup>nd</sup> Respondent. This application was filed by the Petitioners while so employed and they seek the following reliefs:

- (a) A mandate in the nature of writ of certiorari to quash the specific condition in the award of pensions granted to the Petitioners the right to receive their pension only upon their retirement from the Ceylon Electricity Board,

- (b) A mandate in the nature of writ of mandamus compelling the 3<sup>rd</sup> Respondent to award pension to the Petitioners with effect from date of absorption into the Ceylon Electricity Board.

There is no dispute between the parties that the Petitioners were absorbed to the CEB in terms of section 33 of the Ceylon Electricity Board (Amendment) Act No. 32 of 1988 (Act). As the learned Senior Deputy Solicitor General correctly submitted the dispute between the parties is on the consequences of absorption under section 33 of the Act which reads:

“33. Upon the vesting in the Board, under section 20, of an electrical undertaking carried on by a local authority, the following provision shall apply to the officers and servants employed exclusively in such undertaking, on the day preceding the vesting date and who are either

- (a) not offered employment in the Board or in any local authority.
- (b) who are offered and do not accept such employment.

(1) Every such officer or servant who is a member of the Local Government Service and who had reached the age of fifty-five years on the vesting date shall be deemed to have retired from such local authority on that date shall be eligible for such pension under the Local Government Service Pension Regulations as would be awarded to him on such retirement.

(2) The post of every such officer or servant who is a member of the Local Government Service and who had not reached the age of fifty-five years on the vesting date shall be deemed to have been abolished with effect from that date and such officer or servant shall be eligible for such pension or other award under the Local Government Service Regulations as would have been awarded to him had he retired from such local authority on that date on the ground or abolition of post.

(3) Every such officer or servant who not being a member of the Local Government Service and is a member of any other pension scheme established by such local authority and who has reached the age of fifty-five years on that date shall he deemed to have retired from such local authority on that date and shall be eligible for such pension under such scheme as would be awarded to him on such-retirement.

(4) The post of every such officer and servant not being a member of the Local Government Service and is a member of any other pension scheme established by that local authority and who has not reached the age of fifty-five years on the vesting date shall be deemed to have been abolished with effect from (hat date and such officer or servant

shall be eligible for such pension or other award under such scheme as would have been awarded to him had he retired from such local authority on that date on the ground of abolition of post.

(5) Every such officer or servant to whom the preceding provisions of this section do not apply shall be deemed to have retired from such local authority on the vesting date and shall be eligible for the payment of a gratuity of such amount as may be determined by the Minister in consultation with the Minister in charge of the subject of Local Government, having regard to his period of service in such local authority. "

The contention of the Petitioners is that they are entitled to both a salary and pension concurrently from the date of absorption. They contend that they have a legitimate expectation to do so in view of the following judgments:

- (1) S.C. (F/R) Application No. 503/1992
- (2) C.A. Writ Application No. 2241/2004, 2242/2004 and 143/2010

The learned counsel for the Petitioners relied on the decisions in *R. v. Secretary of State for the Home Department, ex parte Khan* [(1980) 2 All.E.R. 337, (1980) 1 W.L.R. 569], *Thirimavithana v. Urban Development Authority* [(2010) 2 Sri.L.R. 262 at 296] and *Judicial Review in Public Law*, Clive Lewis, page 97.

### ***Legitimate Expectation***

In *Council of Civil Service Unions v. Minister for the Civil Service* [(1985) A.C. 374, 408-9] Lord Diplock stated that for a legitimate expectation to arise, the decision:

"must affect [the] other person ..... by depriving him of some benefit or advantage which either (i) he had in the past been **permitted by the decision maker to enjoy** and which he can legitimately expect to be permitted continue to do until there has been communicated to him some rational grounds for withdrawing it on which he has been given an opportunity to comment; or (ii) he has **received assurance** from the decision-maker will not be withdrawn without giving him first an opportunity of advancing reasons for contending that they should not be withdrawn." (emphasis added)

Such legitimate expectations may arise where a public authority has made a clear, unqualified and unambiguous representation to a particular individual that it will act in a particular way. The burden is on the individual to demonstrate that an unqualified, unambiguous and unqualified representation was made [Clive Lewis, *Judicial Remedies in Public Law*, 5<sup>th</sup> Ed., 248 (South Asian Edition)].

The terms of the representation by the decision-maker must entitle the party to whom it is addressed to expect, legitimately, one of two things:

- (a) That a hearing or other appropriate procedure will be afforded before the decision is made. (Procedural Legitimate Expectation); or
- (b) That a benefit of a substantive nature will be granted or, if the person is already in receipt of the benefit, that it will be continued and not be substantially varied. (Substantive Legitimate Expectation)

### ***Ultra Vires Representation***

An ultra vires representation should not be binding on the body which made it as it would entirely destroy the whole doctrines of ultra vires and separation of powers which are related. In *Robertson v. Minister of Pensions* [(1949) 1 K.B. 227] Lord Denning used the doctrine of estoppel to give relief to an individual who had relied on an unlawful representation. However, the House of Lords in *Howell v. Falmouth Boat Construction Co.* [(1951) A.C. 837] disapproved of Lord Denning's remarks relating to an ultra vires assurance and its legal consequences.

In *Regina v. Inland Revenue Commissioners, Ex Parte M.F.K. Underwriting Agents Ltd. and others* [(1990) 1 WLR 1545 at 1573] Judge J. states:

“No legitimate expectation could arise from an ultra vires relaxation of the relevant statute by the body responsible for enforcing it.”

The principle that the court will not give effect to a legitimate expectation where to do so would involve the decision-maker acting contrary to law is fundamental [*Attorney-General of Hong Kong v. Ng Yuen Shiu* [1983] 2 AC 629 at 638; *R. v. North and East Devon Health Authority, Ex parte Coughlan* (2000) 2 WLR 622 at 647, 651, 656; *R v. Secretary of State for Education and Employment, Ex parte Begbie* (2000) 1 WLR 1115 at 1125, 1132)].

In *Tokyo Cement Company (Lanka) Ltd. vs. Director General of Customs* [(2005) BLR 24] the Supreme Court held that the representation must be *intra vires* for there to be a legitimate expectation.

In the cases relied on by the learned counsel for the Petitioners it appears that certain settlements have been arrived at based on the opinion of the Hon. Attorney General. This opinion itself is not before Court. In any event it is only a legal opinion and not binding on this Court. The Constitution only guarantees equal protection of the law and not equal violation of law. One illegality does not justify another illegality [*C.W. Mackie and Co. Ltd. v. Hugh Molagoda, Commissioner General of Inland Revenue and Others* (1986) 1 Sri.L.R. 300 at 309].

In my view the Petitioners are not entitled **to both a salary and pension concurrently** from the date of absorption. In terms of section 33 of the Act, sections 33(1) to (5) apply only to officers and servants employed exclusively in an electrical undertaking carried on by a local authority, who were on the day preceding the vesting of such undertaking in the 2<sup>nd</sup> Respondent Board:

- (a) Not offered such employment in the 2<sup>nd</sup> Respondent Board or in any local authority,
- (b) Were offered such employment and did not accept such employment.

The Petitioners do not admittedly fall within this category.

In any event, the specific condition in the award of pensions granted to the Petitioners the right to receive their pension only upon their retirement from the CEB is not before Court. In *Weerasooriya v. The Chairman, National Housing Development Authority and Others* [C.A. Application No. 866/98, C.A.M. 08.03.2004] Sripavan J. (as he was then) held that the court will not set aside a document unless it is specifically pleaded and identified in express language in the

prayer to the petition. I am in respectful agreement with these dicta and hold that the prayer for a writ of certiorari in the petition is defective.

It is trite law that to issue a writ of mandamus there must be a public or statutory duty. [*De Alwis v. De Silva* (71 N.L.R. 108); *Weligama Multi Purpose Cooperative Society Ltd. v. Chandradasa Daluwatta* (1984) 1 Sri.L.R. 195; *Hakmana Multi Purpose Cooperative Society Ltd. v. Ferdinando* (1985) 2 Sri.L.R. 272; *Piyasiri v. Peoples Bank* (1989) 2 Sri.L.R. 47; *Sannasgala v. University of Kelaniya* (1991) 2 Sri.L.R. 193 and *Samaraweera v. Minister of Public Administration* (2003) 3 Sri.L.R. 64]. There is no such public or statutory duty compelling the 3<sup>rd</sup> Respondent to award pension to the Petitioners with effect from date of absorption into the Ceylon Electricity Board. Therefore, a writ of mandamus as prayed for by the Petitioners cannot be issued.

For all the foregoing reasons, I dismiss the application without costs.

For the avoidance of any doubt, it is observed that the Petitioners will, upon retirement from the 2<sup>nd</sup> Respondent Board, be entitled to a pension for the period of service in relation to the 1<sup>st</sup> Respondent which will be in addition to the retirement benefits which the Petitioners will be entitled to as employees of the 2<sup>nd</sup> Respondent Board.

On 10.07.2019, the parties in C.A. (Writ) 217/2012, C.A. (Writ) 218/2012, C.A. (Writ) 219/2012, C.A. (Writ) 220/2012, C.A. (Writ) 221/2012, C.A. (Writ) 222/2012, C.A. (Writ) 223/2012 and C.A. (Writ) 302/2012 agreed to be bound by the judgment in this application. Accordingly, all those applications are dismissed without costs.

Judge of the Court of Appeal

N. Bandula Karunarathna J.

I agree.

Judge of the Court of Appeal