**IN THE COURT OF APPEAL OF THE DEMOCRATIC SOCIALIST**

**REPUBLIC OF SRI LANKA**

In the matter of an Application for writs of Certiorari and Mandamus under and in term of Article 140 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

Withanage Kamani Perera,

No: 473, Kahantota Road,

Hokandara.

**PETITIONER**

**VS.**

1. State Mortgage and Investment Bank,
2. Dr. Udaya Sri Kariyawasam, Chairman,
3. W.M. Dayasinghe, General Manager,
4. Bandara Weerasinghe, Director,
5. W. Chamila Niroshanee Cooray, Director,
6. H.C. Dilip Lal Silva, Director,
7. S. K. A. Galappatthi, Director,
8. Dr. Priyath Bandu Wickrama, Director,
9. N.P.K. Lokuge, Board Secretary, Assistant General Manager (Legal)
10. A.S.K. Amarasinghe,
    Assistant General Manager,
    (Human Resources and Logistics)
11. D. M. R. Dissanayake,
    Chief Manger (Credit),
12. K. L.N.A. Perera,
    Assistant General Manager (Finance),

1st to 12th Respondents all of:
State Mortgage and Investment Bank
No. 269, Galle Road, Colombo 03

**CA Writ Application No:**

**309/20**

13. D.L. Dias,
    Chief Manager (Branch Operations),
    State Mortgage and Investment Bank,
    No. 26, Susantha Mawatha, Panadura.
14. Hon. Mahinda Rajapaksa,
    Minister of Finance,
    Urban Development and Buddhist Affairs.
15. Hon. Ajith Nivard Cabraal,
    State Minister of Finance, Capital Market,
    State Enterprise Reform,
    14th and 15th Respondents both of:
    Ministry of Finance, The Secretariat,
    Lotus Road, Colombo 01.

**RESPONDENTS**

**Before:** M. T. Mohammed Laffar, J.

S. U. B. Karalliyadde, J.

**Counsel:**

Senany Dayaratne, Nisala Seniya Fernando instructed by Suraj Rajapakse for the Petitioner.

Palitha Kumarasinghe, PC with Ms. G. De Silva for the 1st to 3rd, 5th to 7th and 9th to 13th Respondents.

**Written submissions tendered on:**

06.04.2022 by the Petitioner.

09.04.2022 by the 1st, 4th, 5th, 7th, 9th, and 13th Respondents.

**Argued on:** 24.02.2022.

**Judgement delivered on:** 09.08.2022.

**S.U.B. Karalliyadde, J.**

The Petitioner instituted this action seeking reliefs *inter alia*, writs of Certiorari to quash the decision of the 3rd Respondent containing in the document marked as P-23 not to extend the services of the Petitioner beyond 15.09.2020, the decision of the 10th Respondent to defer the annual increments of the Petitioner from 2018 and not to grant her profit bonus for 2019 containing in the document marked as P-7 and writs of Mandamus directing the Respondents to grant the Petitioner an extension of her services in the post of Chief Manager (Legal) for the period of 15.09.2020 to 14.09.2021, increments from 2018 and profit bonus for the year 2019. The Petitioner is an Attorney-at-Law and was recruited to the State Mortgage and Investment Bank, the 1st Respondent (hereinafter referred to as the Bank) on 21.02.2000 as a Legal Officer Grade II and thereafter, promoted to the post of Chief Manager (Legal) with effect from 16.09.2013. While working on that post, she was appointed as the Secretary to the Board of Directors with effect from 26.06.2015. Upon reaching the age of 55 years, which is the optional retirement age of the Bank, the Petitioner preferred an application for an extension and it was granted for a period of one-year from 15.09.2018 to 14.09.2019. Thereafter, she obtained the 2nd extension for the next year with effect from 15.09.2019 to 14.09.2020. Even though, the Petitioner made a request for the 3rd extension for the period of 15.09.2020 to 14.09.2020, that request was turned down by the 3rd Respondent who was the General Manager of the Bank, by the letter dated 22.07.2020 marked as P-23. The Petitioner alleges that the reason for non-granting the extension is due to an animosity of the 3rd Respondent towards her. According to the Petitioner, the reason behind the animosity is that, in her official capacity as the Board Secretary and the Chief Manager (Legal), she had involved in handling disciplinary proceedings held by the Bank against the 3rd Respondent and participated in the Board meetings in that regard. Consequent to the disciplinary inquiry, the 3rd Respondent was sent on compulsory leave and thereafter, interdicted. Then he instituted Court proceedings against the Bank regarding the actions taken by the Bank against him and

before Courts, parties entered into a settlement. Thereafter, the 3rd Respondent was reinstated as the General Manager/Chief Executive Officer of the Bank.

One of the arguments of the learned Counsel appearing for the Petitioner is that the Respondents have not followed the procedure articulated in the Administrative Circulars of the Bank, bearing No. 294 dated 06.07.2007 marked as P-24(a) and No. 439 dated 01.02.2011 marked as P-24(b) regarding the service extensions of the Bank employees beyond the age of 55 years. According to the P-24(a), an application for an extension should first be placed before the Service Extension Approval Committee and thereafter, its decision should be tabled before the Board of Directors for approval.

The learned President's Counsel appearing for the Respondents argued that the service extensions of the employees who hold the position of Chief Managers and above need not be placed before the Service Extension Approval Committee. He highly relied upon the Board Minutes dated 15.10.2019 of the Bank marked as 1R-11 to substantiate his position and argued that the Administrative Circulars marked as P-24(a) and P-24(b) were superseded by 1R11. When observing the Board Minutes marked as 1R11, it is clear that the content of that document is an explanation of the Additional General Manger (HR and Legal) to the Board about the extension procedure of the employees of the Bank prevailed at that time. The decision taken by the Board of Directors on the explanation of Additional General manger (HR and Legal) is stated in the last paragraph of that document. Accordingly, the Board of Directors has decided not to amend the age of retirement applicable to the permanent employees of the Bank and to continue with the existed procedure with regard to the extension of services and retirements of the permanent employees. P 24(a) and P 24 (b) had not been superseded by 1R11 as contended by the learned President's Counsel. The Respondents have failed to produce any Circular, Rule, Regulation or law contrary to the Circulars marked as P 24 (a) and P24 (b). Therefore, the procedure laid down in P-24(a) and P-24(b) should be applied for the extensions of the Petitioner and accordingly, failure to forward the request of the Petitioner for the extension before the Extension Approval Committee before it was tabled at the Board meeting is against the procedure laid down in the Administrative Circulars of the Bank marked as P24(a) and P24(b).

In the case of *Council of Civil Service Unions Vs Minister for the Civil Service* (GCHQ case)[1], Lord Diplock described procedural impropriety as one of the grounds for judicial review as follows;

"*…I have described the third head as "procedural impropriety" rather than failure to observe basic rules of natural justice or failure to act with procedural fairness towards the person who will be affected by the decision. This is because susceptibility to judicial review under this head covers also failure by an administrative tribunal to observe procedural rules that are expressly laid down in the legislative instrument by which its jurisdiction is conferred, even where such failure does not involve any denial of natural justice…*"

To justify the decision of the Bank to refuse the request of the Petitioner, the learned President's Counsel appearing for the Respondents has drawn the attention of Court to the remarks of the AGM (Legal) (the 9th Respondent) who was the immediate superior officer of the Petitioner mentioned in Part IV of the application of the Petitioner for the extension marked as 1R10 that the application cannot be recommended and the approval of the 3rd Respondent in Part VI of 1R10. The 3rd Respondent in his approval, giving 6 reasons has decided that the extension should not be granted. Those reasons are inter alia, failure of the Petitioner to perform her duties effectively and efficiently, her insubordinate behavior, failure to earn due increment, poor co-operation etc. Explaining to Court as to how the 3rd Respondent has arrived at those conclusions containing in 6 reasons mentioned in 1R10, the learned President's Counsel submitted to the Court that during the period which the Petitioner was in-charge of the Loan Recoveries Department as the Acting Additional General Manager, the Non-Performing Loan (NPL) level has drastically gone up. To substantiate his position, the learned President's Counsel has drawn the attention of the Court to the documents marked as 1R1(a) and 1R1(b). Those documents are the Board minutes of the Bank dated 28.08.2018 and 30.11.2018 respectively. By 1R1(a), the Petitioner has been advised by the Board of Directors to take certain steps to bring down the NPL level. By 1R1(b), the Board has granted the approval to remove the Petitioner from the position of General Manager (Legal) with immediate effect. The learned President's Counsel

[1] [1985] AC 374.

has submitted to the Court that the decisions to defer the increment and not to grant profit bonus were also taken considering the rapid increase of the NPL level. To substantiate that position the learned President's Counsel has also drawn the attention of the Court to the Board Minutes dated 26.07.2019 marked as 1R2. The Board Minutes marked as 1R1(a), 1R1 (b) and 1R2 were in the years 2018 and 2019. Nevertheless, the Court can observe that despite of those Board Minutes, the Petitioner has been granted the first two extensions. Furthermore, even though, the learned President's Counsel has submitted to Court that the NPL level has gone up drastically during the period which the Petitioner performed her duties as the Acting Additional General Manager (Recoveries), as evident by the Annual Report of the Bank marked as P8 for the year 2018, it has gone down by 5.1% in that year when comparing to the previous year. Under the said circumstances, the Court cannot accept the position of the learned President's Counsel appearing for the Respondents that the 3rd Respondent has come to his conclusions mentioned in 1R10 and the Board has decided not to grant the extension increment and profit bonus to the Petitioner considering the fact that the NPL level has gone up drastically during the period which the Petitioner had performed duties as the Acting Additional General Manager (Recoveries).

The argument of the learned Counsel appearing for the Petitioner is that the process and the procedure followed in deciding not to grant the extension is illegal, unreasonable, ultra vires and arbitrary. That argument is based on the fact that the decision of not to grant the extension has taken by the 3rd Respondent whereas in terms of the disciplinary rules of the Bank marked as P10 it should have been taken through a process of disciplinary action against the Petitioner where she could have been heard. In the Board Minutes dated 20.07.2020 marked as 1R4, it has been stated that the Board of Directors had drawn special attention to the matters stated in the Board paper submitted by the AGM (Human Resources and Logistics) (the 10th Respondent) such as unsatisfactory performance, insubordination, deferment of increment due to poor performance, poor coordination etc., of the Petitioner and the Board of Directors confirmed the decision taken by the 3rd, 9th and 10th Respondents not to grant the extension. Therefore, it is evident that the decision of not to grant the extension has been taken by those Respondents and not by the Board of Directors and Board of Directors have endorsed the decision taken by those Respondents. It is borne out from the Board Minutes dated

26.07.2019 marked as 1R2 that the decision to defer the increment and bonus of the Petitioner has been taken by the 3rd Respondent. Admitting the fact that the Petitioner was not heard before the request of the Petitioner for the extension was refused the learned President's Counsel appearing for the Respondents submitted to Court that a necessity does not arise to hear the Petitioner for the reason that she was on extension at the time which the request for the extension in question was made. The Court cannot accept that position for the reason that the right of the Petitioner to make requests for extensions is endorsed in the letter of appointment of the Petitioner marked as P2 and the Respondents have failed to submit any document to the satisfaction of Court that the contract of employment between the Bank and the Petitioner has changed subsequently. Nevertheless, if there is an element of statutory obligation, even if the relationship between the parties is contractual, the Court could exercise its writ jurisdiction.

Wade and Forsyth, "Administrative Law" (11th edn),

"*Contracts are widely used by public authorities as instruments both of policy and of administration…*

*…The government's contractual business is now so vast that it is easily tempted to use it for ulterior purposes, as mentioned earlier. It is a source of great power, which has been called a 'new prerogative'. Contracts have now come to play a large part in the mechanism of public services, for example in the National Health Service, in the social and educational services and in prison administration, under policies of decentralization and privatization and under the wide contracting powers described below. So pervasive is the technique of administration by contract that it has been called 'a revolution in the making' and 'the cutting edge of administrative law'. Contract, it is said, 'has replaced command and control as the paradigm of administration'. Such contracts will not always be designed for enforcement by legal sanctions, since in many cases administrative pressure will be the natural remedy…* (at page 408)

*…The numerous new administrative authorities, both local and central, which came into being in the nineteenth and twentieth centuries opened up a large new territory for the principles of natural justice. The character of the authority was not what mattered:*

*what mattered was the character of the power exercised. If the exercise of that adversely affected legal rights or interests, it must be exercised fairly*… (at page 408)"

Principles of natural justice are applicable to every tribunal or body of persons vested with authority to adjudicate upon matters involving the rights of individuals. It is likewise applicable to the exercise of judicial powers too. Every judicial and quasi – judicial act is subject to the procedure required by natural justice. The breach of any one of the said rules would violate the principles of natural justice.

According to the Schedule B of the disciplinary rules of the Bank marked as P10 insubordinate behavior, neglect or failure to perform the functions of the Bank efficiently and with diligence are acts of minor misconduct (Items 1(i) and (ii) in Schedule B) (at page 37). In terms of section 17.3 of P10 (at page 27) deferment of increment is a major punishment. In terms of section 5 (at page 6), whether the alleged act is a minor misconduct or an act which could be imposed a major punishment, disciplinary action which consists of several steps should be taken against the employee who has committed the wrongful act before taking a decision to impose the punishment. In the instant action, neither such steps have been taken nor any disciplinary proceedings have been held against the Petitioner. Therefore, the decision taken by the Respondent not to grant the extension, increment and bonus to the Petitioner without hearing the Petitioner at a disciplinary inquiry, as provided by the disciplinary rules marked as P10 is against the rule of *audi alteram partem* in the principles of natural justice and therefore it is illegal, arbitrary, capricious and unreasonable.

Administrative Law" by H. W. R. Wade and C. F. Forsyth (Wade & Forsyth)

"*It is fundamental to fair procedure that both sides should be heard: audi alteram partem, 'hear the other side'. This is the more far-reaching of the principles of natural justice, since it can embrace almost every question of fair procedure, or due process, and its implications can be worked out in great detail. It is also broad enough to include the rule against bias, since a fair hearing must be an unbiased hearing; but in deference to the traditional dichotomy, that rule has already been treated separately*… (at page 405)

In the case of *Ridge v. Baldwin*[2] Lord Denning held that,

"*breach of the principles of natural justice renders the decision voidable and not null and void ab initio. An administrative official or tribunal exercising a quasi – judicial power is bound to comply with the principles of natural justice. i.e. to comply with the rules of audi altera partem and nemo judex in causa sua. A quasi- judicial decision may involve finding of facts and it affects the rights of a person. Sometimes such decisions involve matters of law and facts or even purely matters of law*."

*Amarasinghe v. Wijeratne*[3] Gooneratne.J, held as follows,

"*One cannot be permitted to assume or presume, when an inquiry is held especially concerning a persons vested rights. Authority concerned is bound to grant an opportunity to the party concerned to present his case however weak or strong his case may be. One should not be permitted to hide behind the law and take advantage*.

The learned President's Counsel appearing for the Respondents has drawn the attention of Court to the fact that the Petitioner has not sought extensions beyond September 2021 in the Petition and argued that since the extension sought in the Petition is from September 2020 to September 2021 and that period has already lapsed, this application is academic. Nevertheless, as per the Administration Circular regarding the extension of services of the Bank employees marked as P24(a), the Petitioner is entitled for extensions up to 60 years of age. The Petitioner will be completing 59 years on 15. 09. 2022 as per her birth certificate marked as P1(d). Therefore, even though the Petitioner has not sought an extension from 14. 09. 2022 to 15. 09. 2023 as a relief in the Petition, I am of the view that no prejudice could be caused to the Respondents if the Court make an order to grant an extension to the Petitioner for a period from today till 15. 09. 2023.

The learned President's Counsel has also argued that the Petitioner is not entitled to reliefs regarding the increment and bonus for the reason that she has not come to Court

[2] (1964) A.C. 40.
[3] [2012] BLR 390 at 396.

seeking reliefs within a reasonable time. The Petitioner has come to Court seeking reliefs on the increment and the bonus respectively 2 and 1 ½ years later from the denial.

In the case of *Bibile Kotagama Multi Purpose Cooperative Society Vs. Uva Palath Samupakara Sewaka Commission Sabhawa* [4], L.T.B. Dehideniya, J. held;

" *Unexplained delay in coming to Court is considered as bar in obtaining relief in discretionary remedies such as prerogative writs. But the delay in coming to Court has to be considered in reference to the circumstances of each case*…" (at page 5)

Arriving at his decision L.T.B. Dehideniya, J. has referred the following authorities,

*"… Lindsey Petroleum Co. Vs. Hurd*[5]*,*
*An application for a Writ of Certiorari should be filed within a reasonable time from the date of the Order which the applicant seeks to have quashed. What is reasonable time and what will constitute undue delay will depend upon the facts of each particular case. However the time lag that can be explained does not spell laches or delay. If the delay can be reasonably explained, the Court will not decline to interfere. The delay which a Court can excuse is one which is caused by the applicant pursuing a legal remedy and not a remedy which is extra -legal. One satisfactory way to explain the delay is for the petitioner to show that he has been seeking relief elsewhere in a manner provided by the Law. When the Court has examined the record and is satisfied the Order complained of is manifestly erroneous or without jurisdiction the Court would be loathe to allow the mischief of the Order to continue and reject the application simply on the ground of delay, unless there are very extraordinary reasons to justify such rejection.*

*Where the authority concerned has been acting altogether without basic jurisdiction, the Court may grant relief in spite of the delay unless the conduct of the party shows that he has approbated the usurpation of jurisdiction. In Any such event, the explanation of the delay should be considered sympathetically."*

[4] CA PHC APN 186/2013.
[5] (1874) L.R., 5 P.C 221 at 239.

In this connection Professor Wade in his "Administrative Law" 4th Ed. at page 561 states,

*"the discretion to withhold remedy against unlawful action may make inroads upon the rule of Law and must therefore be exercised with the greatest care. In any normal case the remedy accompanies the right, but the fact that a person aggrieved is entitled to Certiorari ex debito justitiae does not alter the fact that a Court has power to exercise the discretion against him, as it may in the case of any discretionary remedy. "*

The Delhi High Court in the case of *Dinesh Elhence v Delhi Development Authority*[6], the issue of delay in filing writ applications has been discussed and held that;

*" 14. No hard-and-fast rule can be laid down as to when the High Court should refuse to exercise its jurisdiction in favour of a party who moves it after considerable delay and is otherwise guilty of laches. Discretion must be exercised judiciously and reasonably. In the event that the claim made by the applicant is legally sustainable, delay should be condoned. In other words, where circumstances justifying the conduct exist, the illegality which is manifest, cannot be sustained on the sole ground of laches. When substantial justice and technical considerations are pitted against each other, the cause of substantial justice deserves to be preferred, for the other side cannot claim to have a vested right in the injustice being done, because of a non-deliberate delay. The court should not harm innocent parties if their rights have in fact emerged by delay on the part of the petitioners*[7]*... "* (Emphasis added).

Considering all the above stated facts and circumstances, I hold that the Petitioner is entitled to writs of Certiorari as prayed for in paragraphs 'c' to 'e' of the Petition to

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[6] Case No: W. P. (C) *2954/2016* (2016 Indlaw DEL 4553).

[7] *(Vide Durga Prashad* v. *Chief Controller of Imports and Exports* [(1969) 1 *SCC* 185 : *AIR 1970* SC 769 1968 *Indlaw* SC 352), *Collector (LA)* v.*Katiji* [(1987) 2 *SCC 107* : 1989 *SCC (Tax)* 172 : *AIR* 1987 SC 1353 1987 *Indlaw* SC 28811}, *Dehri Rohtas Light Railway Co. Ltd.*v. *District Board, Bhojpur* [(1992) 2 *SCC* 598 : *AIR* 1993 SC *8021992 Indlaw* SC 1 *o* 79}, *Dayal Singh* v. *Union of India [(2003) 2 SCC* 593 : *AIR 2003* SC *1140 2003 Indlaw* SC 61} *and Shankara Coop. Housing Society Ltd.* v. *M Prabhakar [(2011)* 5 *SCC 607 : (2011)* 3 *SCC (Civ)* 56: *AIR 2011* SC 2161 *2011 Indlaw* SC *340}.)*

quash the decisions containing in the document marked as P23 and P7 and writs of Mandamus directing the Respondents to grant an extension to the Petitioner in the post of Chief Manager (Legal) up to 15.09.2023 from today, directing the Respondents to pay the increment to the Petitioner from 16.09.2018 to 14.09.2019 and bonus for the year 2019. The Petitioner is entitled to the increment and bonus and all other entitlements for the period from today until 15.09.2023. Writs of Certiorari and Mandamus are issued accordingly. The Respondents should pay Rs. 75,000/= as costs of this application to the Petitioner.

*Application allowed with costs.*

**JUDGE OF THE COURT OF APPEAL**

**M.T. MOHAMMED LAFFAR, J.**

**I agree.**

**JUDGE OF THE COURT OF APPEAL**