

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 Prohibition under Article 140 of the Constitution of the Republic of Sri Lanka.

K. Manawadu

No. 60, Main Street, Norwood.

Petitioner

Vs.

Case No. C. A. (Writ) Application 109/2014

1. Bank of Ceylon
No. 01, BOC Square,
Bank of Ceylon Mawatha, Colombo 01.
2. Harsha Abeywickrama – Chairman
3. Raju Sivaraman – Director
4. K. M. A. N. Daulagala – Director
5. Nalini Abeywardene – Director
6. Chandrasiri De Silva – Director
7. Lalith Withana – Director
8. R. M. A. Rathnayake – Director
2nd to 8th Respondents of –
Bank of Ceylon
No. 01, BOC Square,
Bank of Ceylon Mawatha, Colombo 01.
9. Asst. General Manager (Central Province)
10. Operations Manager/Authorized Officer
9th and 10th Respondents of –
Bank of Ceylon (Central Province Office)
No. 88, Dalada Veediya, Kandy.

Respondents

11. Neil Umagiliya – Chairman
12. M. T. I. Visakha Amarasekere – Director
13. P. Lalith Withana – Director
14. A. V. K. Madhavie Herath – Director
15. H. Isuru Balapatabendi – Director
16. G. Harsha Wijayawardhana – Director

11th to 16th Respondents of –

Bank of Ceylon

No. 01, BOC Square,

Bank of Ceylon Mawatha, Colombo 01.

Added Respondents

Before: Janak De Silva J.

N. Bandula Karunarathna J.

Counsel:

Sanjeewa Ranaweera for the Petitioner

Chaya Sri Nammuni SSC for the Respondents

Argued on: 21.05.2019

Written Submissions tendered on:

Respondents on 06.08.2019

Decided on: 11.03.2020

Janak De Silva J.

The Petitioner was an employee of the Bank of Ceylon (BOC) and at the time of her retirement on 17.09.2013 she was serving as the Manager of the Bogawantalawa Branch.

The dispute between the parties arise on charge sheet dated 12.03.2014 (P6) issued to the Petitioner by the 1st Respondent BOC. The Petitioner claims that the BOC did not have the power to issue charge sheet P6 since the Petitioner had retired on 17.09.2013.

Although several reliefs were prayed for in the petition, at the hearing Court was informed that the Petitioner was limiting the relief to a writ of certiorari quashing the purported charge sheet dated 12.03.2014 (P6) issued to the Petitioner by the 1st Respondent BOC.

In order to determine whether the issue of charge sheet dated 12.03.2014 (P6) is ultra vires the powers of the 1st Respondent BOC, it is important to examine the disciplinary powers of the 1st Respondent BOC. Although the Petitioner pleaded that the relevant Disciplinary Code is P7, it is effective from 2nd May 1991 whereas the Respondents produced the "Disciplinary Code of Bank of Ceylon" (1R1) which is effective from 01st November 2008 which is the applicable Disciplinary Code.

Clause 2.1 therein specifies that the provisions of the Code applies to:

- (a) All employees in the permanent service of the Bank (whether on probation or confirmed) and those employed on contract basis.
- (b) **Employees who have reached the age of retirement and whose retirement or extension of service have been subjected to the finalisation of the pending disciplinary proceedings** against them, even after their age of retirement. (Emphasis added)

The Petitioner falls within (b) and there are two requirements that must be satisfied for it to apply. Firstly, the Petitioner should have reached the age of retirement which is not in issue. Secondly, her retirement must have been subjected to the finalisation of the pending disciplinary proceedings.

It is not in dispute that certain steps were taken by the 1st Respondent BOC by issuing letters marked P3, P4(a) and P4(b) to the Petitioner in preparation for her retirement on 17.09.2013. The Respondents claim that they were sent several months before the retirement of the Petitioner as is customary before any loss or fraud was discovered.

The Respondents submitted that on the last date of work of the Petitioner, namely 16.09.2013, the next Manager, who was then the 2nd Officer of the Bogawantalawa Branch of the 1st Respondent BOC, one Mr. Shanmuganathan had wanted to check the vault of the pawning branch in order to take over the functions as Manager as is the usual custom.

Then it was discovered that certain gold items were missing from the vault which were then itemised as evidenced from document marked 1R3 on which the Petitioner signed and agreed to

pay Rs. 6,161,000/= which was the loss discovered at the time. The charge sheet P6 is based upon these facts.

The matter for determination is whether these facts are sufficient to conclude that the Petitioner is an employee of the BOC "whose retirement or extension of service have been subjected to the finalisation of the pending disciplinary proceedings".

Prior to considering the relevant provisions in the Disciplinary Code of Bank of Ceylon (1R1), I wish to examine the approach of the Courts to the comparable situation in so far as public officers are concerned.

Section 12(1) of the Minutes of Pension which is applicable to public officers provides as follows:

"12(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, Local Government and Home Affairs may either withhold or reduce any pension, gratuity or other allowance payable to such public servant under these Minutes." (Emphasis added)

In *Amarasekera v. Karunasena Kodituwakku, Minister of Human Resource Development, Education and Cultural Affairs and Others* [(2005) 2 Sri.L.R. 58] the Petitioner had been called upon by the letter dated 20th December 2002 to explain certain irregularities relating to certain financial transactions involving the Secondary Education Modernization Project that took place during the period 21st to 29th October 2002, and after the Petitioner tendered his explanations by his letter dated 31st December 2002, a preliminary investigation had been held and the Interim Report relating to which dated 29th January 2003 revealed that the Petitioner was, along with certain other officers, responsible for some of the said financial irregularities. The Public Service Commission has been informed of these findings by the letter dated 13th February 2003 albeit two days prior to the retirement of the Petitioner, and the said Commission has determined that the payment of pension to the Petitioner, should be withheld pending the ensuing disciplinary proceedings as evidenced by the letter dated 23rd June 2003. This Court held that these facts were sufficient to bring it within the words *disciplinary proceedings were pending*.

In *Peiris vs. Wijesooriya, Director, Irrigation and Others* [(1999) 1 Sri.L.R. 295] stock verifications had revealed certain shortages and the Petitioner had been interdicted in September, 1986. There were no pending disciplinary proceedings; but the Supreme Court held that disciplinary proceedings were "contemplated" in view of the long-drawn-out investigations which was for the purpose of precisely ascertaining the losses and fixing responsibility for such losses.

The facts in this case are different. Here the discovery of the missing gold items from the vault on the last working day of the Petitioner which were then itemised as evidenced from document marked 1R3 on which the Petitioner signed and agreed to pay Rs. 6,161,000/= which was the loss discovered at the time is in my view insufficient to bring the instant case within the words "whose retirement or extension of service have been subjected to the finalisation of the pending disciplinary proceedings". The 1st Respondent BOC did not take any positive action to subject the retirement of the Petitioner to the finalisation of any pending disciplinary proceedings since no disciplinary proceedings were pending.

However as this is a discretionary remedy the Court has the power to withhold any relief to the Petitioner even where it is established that the impugned decision is ultra vires.

The unmeritorious conduct of the Petitioner is an issue that must be considered by this Court. In terms of Article 140 of the Constitution this Court must act "according to law" in deciding whether to issue a writ of certiorari. This means English common law principles [*Sirisena Cooray v. Tissa Dias Bandaranaike* (1999) 1 Sri. L. R. 1 at 14-15)].

English Courts have considered the conduct of the Petitioner in deciding whether to grant discretionary relief by way of judicial review. A ratepayer was denied a remedy to quash a refusal to make a refund of rates because of his previous deliberate and unjustifiable withholding of rates owed [*Dorot Properties Ltd. v. London Borough of Brent* (1990) C.O.D. 378]. A local authority which pursued pointless litigation was denied any remedy [*Windsor and Maidenhead Royal BC v. Brandrose Investments Ltd.* (1983) 1 W.L.R. 509]. A local council which sought to challenge ministerial confirmation of its own proposals for re-organising schools, relying on their own procedural error was denied relief [*R. v. Secretary of State for Education and Science ex. P. Birmingham City Council* (1985) 83 L.G.R. 79].

The Petitioner has not come to Court with clean hands and her conduct is unmeritorious. It is inconceivable that the Petitioner would have agreed to pay the value of the lost gold unless she was responsible for it.

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

Judge of the Court of Appeal

N. Bandula Karunarithna J.

I agree.

Judge of the Court of Appeal