

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 under Article 140 of the Constitution of Sri Lanka.

M. A. Samaradasa

No. 31/5, Samudrasanna Place, Mount Lavinia.

Petitioner

Case No. CA (Writ) 1769/2001

Vs.

1. The Director General
Combined Services,
Ministry of Public Administration,
Colombo 07.
2. The Food Commissioner
Food Department,
Colombo 02.
3. Deputy Food Controller (Supplies)
Food Department,
Union Place,
Colombo 02.
4. Asst. Food Controller (Stores)
Food Department,
Narahenpita.
5. Officer-in-Charge
Now departmentally designated as "Director
Stores"
Division 6, Unit 4,
Food Department,
Narahenpita.

6. The Director General of Establishment
Ministry of Public Administration,
Colombo 07.
7. The Secretary
Public Service Commission,
BMICH Building,
Colombo 07.
8. The Director of Pensions
Maligawatta Secretariat,
Colombo 10.

Respondents

Before: Janak De Silva J.

N. Bandula Karunarathna J.

Counsel:

Navin Marapana P.C. with Janani Peiris for the Petitioner

Anusha Fernando SDSG for the Respondents

Argued On: 22.07.2019

Written Submissions Filed On:

Petitioner on 22.10.2019

Respondents on 09.09.2019

Decided On: 29.05.2020

Janak De Silva J.

The Petitioner has raised a preliminary objection that the Respondents have failed to comply with Rule 3(7) of the Court of Appeal (Appellate Procedure) Rules of 1990 (1990 Rules) which requires that "a statement of objections containing any averment of facts shall be supported by an affidavit of such averments". As such it is submitted that the averments in the petition and affidavit filed therewith stand uncontradicted and as such the Petitioner is entitled to the relief claimed in the petition.

Rule 3(4) (b) (i) of the 1990 Rules requires a statement of objections to be filed by each respondent within four weeks. The Respondents have only filed affidavits without any statement of objections.

The learned President's Counsel for the Appellant cited the decision of this Court in *Gita Fonseka v. The Monetary Board of Central Bank of Sri Lanka* [(2004) 1 Sri.L.R. 149] where Wijeratne J. (with Tilakawardena J. agreeing) held that a Respondent who has failed to comply with Rules 3(4)(b)(i) read with 3(7) of the 1990 Rules is deprived of his right to appear in the proceedings in opposition to the proceedings.

However, Justice Sriskandarajah J. in *Assemblies of God of Ceylon v. Urban Council, Anuradhapura and another* [(2007) 1 Sri.L.R. 89] held that even where a Respondent fails to file a statement of objections, he has the right to appear and object to the application of the Petitioner by making submissions on questions of law and on the material before Court.

A different approach was taken by this Court in *Ranaweera v. Mahaweli Authority of Sri Lanka* [(2004) 2 Sri. L. R. 346] when the same objection was raised. Marsoof J. (with Sripavan J. agreeing) held (at page 350) as follows:

"I am inclined to the view that the Petitioner should have in the first instance invited the attention of the Court to the alleged non-compliance with the rules and got the matter listed for an order of Court as contemplated by Rule 3(14) of the aforesaid Rules. The said rule is quoted below:

"Where the parties fail to comply with the requirements set out in the preceding rules, the Registrar shall without delay, list such application for an Order of Court."

The objective of this Rule appears to be to give an opportunity to a party in default to take steps to comply with the rules of Court. In my view of (sic) the Petitioner should have objected to the alleged "Objections" filed by the Respondents by way of motion and had the matter referred for an Order of Court. Instead, the Petitioner has chosen to file counter affidavit wherein he has taken up the question of non-compliance with the Rules

in the said counter affidavit... By filing counter affidavits the Petitioner has waived the right to take objection to the non-compliance of the rules by the Respondents".

(Emphasis added)

The shift in approach by this Court is reflected in *Senanayake v. Commissioner of National Housing and Others* [(2005) 1 Sri.L.R. 182] where a divisional bench of this Court considered the validity of an affidavit affirmed outside the jurisdiction of the Justice of the Peace who attested to its execution. Marsoof J. (with Wijayarathne J. and Sripavan J. agreeing) held (at page 184):

"I am of the view that the Court of Appeal (Appellate Procedure) Rules 1990 have been formulated to facilitate the judicial process and with a view of achieving justice rather than injustice. It appears from Rule 3(14) that it is contemplated that where there is some non-compliance with the Rules, the Registrar should put it up to the application for an order of Court. "

In *Gita Fonseka v. The Monetary Board of Central Bank of Sri Lanka* (supra) Wijayarathne J. did consider the application of Rule 3(14) of the 1990 Rules but held that even where the registry has failed to comply with this rule, it cannot rectify the fault that occurred when the respondent failed to comply with the rules. It appears to me that Wijayarathne J. appears to have softened this approach in *Senanayake v. Commissioner of National Housing and Others* (supra) when he agreed with Marsoof J. and Sripavan J. more than one year after *Gita Fonseka v. The Monetary Board of Central Bank of Sri Lanka* (supra).

In my view, the approach taken in *Ranaweera v. Mahaweli Authority of Sri Lanka* (supra) reflects the correct approach to the failure to file a statement of objections. The Petitioner who complains of the failure to comply with the 1990 Rules must in the first place comply with them. By filing counter objections, he has waived the right to take objection to the non-compliance of the rules by the Respondents. The preliminary objection is overruled.

The Petitioner was appointed to the post of Store-Keeper Grade III with effect from 1st April 1959 and served in the Department of Irrigation, Highways and the Central Engineering Organization. Consequent to the closure of the Central Engineering Organization, he was transferred to the Food Department from 1986.

He was interdicted 05.10.1990 while serving as Chief Store-Keeper at the Narahenpita Food Department Stores Complex (P1). However, as the inquiry took a prolonged time, the Director-General (Establishment) directed that the Petitioner be paid a temporary pension till the inquiry was over (P8).

The Petitioner was indicted in the High Court for criminal breach of trust but the learned High Court Judge acquitted him on 28.02.2001 on the basis that the prosecution had failed to establish a prima facie case against the Petitioner (P9). However by that date, the Petitioner had been retired under section 12(1) of the Minutes of Pension with effect from 05.10.1990 (P10).

In consequence of the order of the learned High Court Judge and representations made by the Petitioner, it was decided to change the retirement of the Petitioner under section 12(1) of the Minutes of Pension to a normal retirement (P11 and P12). However, the 2nd Respondent by letter date 08.05.2001 has imposed a surcharge of Rs. 322,428/= on the Petitioner (P17).

The Petitioner is seeking a writ of certiorari quashing P17 and a writ of mandamus compelling the Respondents to pay all emoluments withheld during the period of interdiction including full pay up to the date he reached the date of compulsory retirement and to pay the Petitioner's pension with arrears up to the date of retirement i.e. 05.10.1990.

The Petitioner firstly assails his retirement under section 12(1) of the Minutes of Pension. However he has not sought a quashing of the letter dated 31.01.1991 (P10) which contains the said decision. In *Weerasooriya v. The Chairman, National Housing Development Authority and Others* [CA 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.

Next the learned President's Counsel for the Petitioner submitted that the Director-General of Combined Services had, by letters dated 22.05.2001 and 25.05.2001 (P11 and P12) having referred to the Minutes on Pension and the Public Administration Circular No. 29/90, ordered the conversion of the retirement of the Petitioner under section 12(1) on the Minutes on Pension to a normal retirement and that once this was done there is no legitimate basis to impose a surcharge on the Petitioner as done by P17.

The learned SDSC submitted that P12 had been cancelled almost immediately by letter dated 31.05.2001 (1R1) which was not disclosed by the Petitioner. It appears that this was done since the 1st Respondent had issued P12 without considering the observations of the 2nd Respondent which was subsequently called for by letter dated 08.06.2001 (1R2).

The 2nd Respondent sent his observation by letter dated 27.06.2001 [1R2(a)], the 1st Respondent had by letter dated 02.11.2001 (1R3) set out his decision as follows:

- (a) Convert the Petitioner's retirement under section 12(1) to a normal retirement;
- (b) The Petitioner be required to pay a surcharge in a sum of Rs. 423993.12 as set out in as later corrected to 322,428.12 by 1R2(b) representing the loss caused to the Government.

The surcharge has been imposed after a formal inquiry where the Petitioner took part. Nowhere in the petition does the Petitioner take up the position that he was not given a hearing prior to the imposition of the surcharge.

In any event, the relief sought of quashing P17 is misconceived in law as that is only an intimation made to the Petitioner. The decision is reflected in 1R3 but the Petitioner has not sought a quashing of it which is fatal [*Weerasooriya v. The Chairman, National Housing Development Authority and Others* (supra)].

It must be also borne in mind that the acquittal in the High Court is based on the absence of proof beyond reasonable doubt.

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

Judge of the Court of Appeal

N. Bandula Karunarthna J.

I agree.

Judge of the Court of Appeal