DHEERASENA
v
POST MASTER AND OTHERS

COURT OF APPEAL
EKANAYAKE, J. (P/CA)
GOONERATNE, J.
CA 552/2007 (WRIT)
MAY 5, 2008

Writ of Mandamus – Prior services to be considered and added to entitle him for his full pension? – Public Law remedy – If there is only a privilege does mandamus lie? – No absolute right to a pension? – Delay?

The petitioner sought a *writ of mandamus* compelling the respondent to consider his prior services and to add same to entitle him for his full pension.

Held:

(1) The *writ of mandamus* retains its original character as a public law remedy, and it should be a duty of a public nature where power is conferred by law to exercise it in a given factual situation may be either a duty or enable only a privilege conferred by law on the repository of such power.

(2) If this is only a privilege either to exercise it or not *mandamus* does not lie to compel its exercise, in the case of a privilege to exercise or not to exercise the power in question, *mandamus* still does not lie even if the repository of the power decided to exercise it.

The petitioner in terms of the Minutes on Pension does not have an absolute right for a pension therefore there is no duty cast to grant a pension.

Per Anil Gooneratne, J.

"Though the petitioner has a grievance he cannot maintain this application since the facts contended have been determined by the Court of Appeal, one cannot keep on reagitating the same issue over and over again by introducing the case of another person to get over the difficulty".

(3) Section 20(a) of the Minutes of Pensions is relevant only to a public servant who at the time of retirement was entitled to a pension, but due to an *interruption of service he becomes not entitled to the payment of the* complete pension, where the minimum pension has not been covered, his prior service could be added, even though he was daily paid or held a

temporary monthly paid or was a permanent non-pensionable monthly paid employee.

(4) Inordinate delay would disentitle the petitioner to relief by way of a prerogative writ.

APPLICATION for a *Writ of Mandamus.*

Cases referred to:

(1) *J.B. Textiles Industries Ltd.* v *Minister of Finance and Planning* 1981 2 Sri LR 238, 280-285.

(2) *Perera* v *Chairman, Urban Council Dehiwela Mt. Lavinia* 62 NLR 383.

(3) *Attorney-General* v *Abeysinghe* 78 NLR 381.

(4) *Gunawardane* v *Attorney-General* 49 NLR 359.

(5) *Nixon* v *Attorney-General* 1930 1 Chan 587.

(6) *Nixon* v *Attorney-General* 1931 AL 184 (HC).

(7) *Athula Ratnayake* v *Jayasinghe* 78 NLR 35.

(8) *Rasammah* v *A.P.B. Manamperi (Government Agent, Anuradhapura)* 77 NLR 313.

(9) *Dissanayake* v *Fernando* 71 NLR 356.

S. Amarasekera for petitioner.

A. Gnanathasan. DSG with *G. Wakishta Arachchi* SC for respondent.

June 19, 2008

ANIL GOONERATNE, J.

The petitioner a retired Grade II Post Master has filed this application seeking a *Writ of mandamus* praying for relief as in prayer (ii) of his petition. By this application petitioner pleads that his prior services should be considered and added to entitle him for his full pension and as referred to in document P3, P4, P10, P11 and P12.

Preliminary objections were raised by the learned Deputy Solicitor-General who appeared for the respondents, to the application of the petitioner and their objections are pleaded in paragraphs 3 of the statement of objections of the respondents as follows:

(i) The petitioner is estopped from invoking the Writ Jurisdiction of Your Lordships' Court since the facts contested in this application have already been determined by the Court of

Appeal in CA 785/2001. The order of the said application has been annexed to the petition marked as P6.

(ii) The petitioner has suppressed and/or misrepresented vital material facts to Your Lordships' Court.

(iii) There is inordinate delay on the part of the petitioner even when the petitioner invoked the jurisdiction of Your Lordships' Court in the year 2001 since the petitioner retired in the year 1988.

(iv) The 2nd respondent cannot determine the eligibility of the payment of pension to the petitioner in contravention of the letter of appointment (P1) and the Cabinet decisions (1R3A,1R3-B, 1R4-A, 1R5-A, 1R5-B) they have already been made, refusing the payment of pension to the petitioner;

(v) Necessary parties i.e. the Cabinet of Ministers are not before Your Lordships' Court.

The case of the petitioner is that he was appointed a Sub-Post Master of Pahala Moragahawewa Sub-Post Office on 01.02.1958 and continued to serve until 01.03.1988. On or about 01.10.1980 the said Sub-Post Office had been upgraded and the petitioner who was the incumbent Sub-Post Master was appointed to the post of Grade II Post Paster and Signaler by the appointed letter marked P1, dated 23.01.1981. Petitioner completed 8 years service in the said post which he states is pensionable, until he reached the age of 60 years on 01.03.1988. By letter marked P2 petitioner was released from service.

On the appointment as Sub-Post Master by P1, petitioner had served 8 years and 4 months when he reached the age of retirement which period was insufficient for pension entitlement. As such in order to complete 10 years of service to make him eligible for a pension he applied for an extension of service. He claimed it was granted (no document annexed to support this point). However petitioner states that the letter of extension of service to conclude 10 years service was concluded after 27 days and he could not serve the required period of 10 years. (no document annexed to support this point). Petitioner also pleads (paragraph 8 of the

petition) that he appealed to the authorities against the cancellation of service extension which he claims to have been granted and cancelled as stated above and for such appeal there was no response, until he received letter P3 of 17.8.1999 from the 3rd respondent to take steps to award the petitioner a pension.

The petitioner seeks to support his case by referring to letters marked P3, P4 addressed by 3rd respondent to 1respondent (Post Master General) which request the Post Master General to grant the petitioner pension rights. To this application documents P10-P12 are also annexed to support the petitioner's case. Documents P3, P4 and P10-P12 are all letters written by Government officials requesting that a pension be granted to the petitioner (including Director Pensions).

The counter objections of the petitioner *inter alia* focus on the following, where the petitioner thought it fit to formulate certain arguments to counter the position of the respondents.

(a) Denies that he misrepresented or suppressed facts.

(b) That he is not estopped by the previous case he filed and determined by this court since a cause of action accrued to him after a grant of pension to another person called Anagihamy who was entitled to a pension.

(c) Cabinet of Ministers are not necessary parties since the Cabinet did not decide the granting of pension to the above named Anagihamy.

(d) Although the petitioners service before the pensionable post, has been waived as non-pensionable service, subscription has been deducted from the salary to the Public Servants' Provident Fund from 25.09.1978.

(e) Although the petitioner did not get the privilege of drawing a pension as he was not in service on 12.11.1994 as per ඇප්ප/95/2547/114/067 dated 15.11.1995 of the Secretary to the Cabinet of Ministers. Cabinet White Paper No. 62/1995 enable every substitutes and assistants of Sub Post Masters to claim public service in view of that there is no difficulty in recognising Sub Post Master as Public Servants. Vide paragraphs 6 of P7.

The *Writ of Mandamus* retains it's original character as a public law remedy and it should be a duty of a public nature where power is conferred by law, to exercise it in a given factual situation may be either a duty, or enable only a privilege, conferred by law on the repository of such power. It is only if there is a duty to exercise it in a given situation that *mandamus* lies to compel it's exercise in that situation.

If there is only a privilege either to exercise it or not, *mandamus* does not lie to compel it's exercise. *J.B. Textiles Industries Ltd.* v *Minister of Finance and Planning.*(1) In the case of a privilege to exercise or not to exercise the power in question, *mandamus* still does not lie even if the repository of the power already decided to exercise it. *Perera* v *Chairman, Urban Council Dehiwela-Mount Lavinia.*(2) The petitioner in terms of the Minutes on Pension does not have an absolute right for a pension. Therefore there is no duty cast to grant a pension in the manner pleaded in the petition.

The application before this court seeks to compel the 2nd and 3rd respondent in view of documents P3, P4, P10-P12 to pay the petitioner a full pension. Before I could answer the preliminary objection raised by the learned Counsel for the State, it would be necessary to consider whether in view of the very nature of this prerogative writ whether the petitioner could get the benefit of a *Writ of Mandamus* to compel the state to pay him a pension. Does the Petitioner have a legal right in this context to demand for a pension?

I would refer to a decided case on 'pension' from which the question of a legal right to a pension was considered. In *Attorney-General* v *Abeysinghe*(3).

Held:

(1) The Minutes on Pensions do not create legal rights enforceable in the Courts.

(2) A Court has no jurisdiction to grant a declaration in respect of a pension.

(3) The expression "no absolute right" in the first section of the Minutes on Pensions means "no legal right". In Sri Lanka there is no constitutional provision or any other provision of

written law which has the effect of altering the meaning of Section 1 of the Minutes on Pensions.

At 364/365

The expression "no absolute right" to my mind means "no legal right". It is a signal hoisted by the draftsman to indicate both to the beneficiaries under the Minutes on Pensions and to the Courts that the Minutes are not to be taken as creating rights enforceable in the Courts. The "no legal right" concept contained in Section 1 of the Minutes is then reinforced by the text of rules 2 and 15 which contain the expressions "may be awarded" and "may in his discretion grant".

It was held as long ago as 1948, in the case of *Gunawardene* v *The Attorney-General*(4) that the Minutes on Pensions merely regulates the administration of pensions by those in whose hands that duty is placed and does not confer upon retired government servants any legal rights in respect thereof. I find myself, with respect, in agreement with this decision. In *Gunawardene's* case Gratiaen, J. was following the decisions of the English Court of Appeal and of the House of Lords in the case of *Nixon* v The *Attorney-General*(5) in which those two judicial bodies were called upon to examine Section 30 of the Superannuation Act (4 and 5 William IV, Chapter 24) of England.

Section 1 of the Minutes of Pensions follows very closely the language of Section 30 of the Superannuation Act. I think it would be useful to reproduce a few passages from the judgments in the Court of Appeal (*Supra*(5)) and of the *House of Lords*(6). The Court of Appeal said:

> "The Act appears to me to be an Act to regulate the administration of the pension and superannuation allowances by those in whose hands that duty is placed, and in no part is there any conferment upon the recipients of a title to claim or receive them. To put the question beyond doubt Section 30 is in these terms: 'Provided always, and be if further enacted, that nothing in this Act contained shall extend or be construed to extend to give any person an absolute right to compensation for past services .... ." Words could not be more explicit. An attempt was made to suggest that the use of the

word "absolute" left it possible that a conditional right remained to the civil servants, but I cannot accept that view. In my judgement the word is used so that a right in any form may be negativated. The Section destroys the possibility of a claim of legal right".

In view of the above the petitioner has no absolute right for a pension or a legal right; and as such it may not be necessary to go into the preliminary objection. Nevertheless we are of the view that the petitioner though he has a grievance cannot maintain this application since the facts contested in this application have already been determined by the Court of Appeal in C.A. 785/2001. One cannot keep on reagitating the same issue over and over again by introducing the case of another person namely 'Angihamy' in the manner disclosed by the petitioner in his application to get over the difficulty.

In C.A. 758/2001 .... It was held,

In terms of Section 2(1) of the Minute of Pensions a minimum period has been prescribed, and a person would not be entitled or eligible for the payment of pensions unless he has served 120 months or ten years. Clearly on the facts referred to above the petitioner is not entitled to a pension in terms of this provision contained in the Minute on Pensions.

It has been argued by Counsel appearing for the petitioner that the payment of this pension was recommended by the Director of Pensions who has made this recommendation of payment in terms of and under Section 20(a) of the said Minute of Pensions. This Section is relevant only to a public servant who at the time of retirement was entitled to a pension, but due to an interruption of service he becomes not entitled to the payment of the complete pension. Where the minimum period has not been covered for the payment of pensions, his prior service could be added, even though he was daily paid or held a temporary monthly paid or was a permanent non-pensionable monthly paid employee. This situation has not covered the present application of the petitioner.

The above extract from the judgment is a very comprehensive answer to the entire issue even if one were to argue that the petitioner has a legal right. I need not consider every limb of the

preliminary objection and would also accept the position of the respondents of an inordinate delay in the present application which would disentitled the petitioner for relief under writ jurisdiction since over the years a very long lapse of time is apparent from the date of retirement of the petitioner. (1988) Inordinate delay would disentitle the petitioner of relief by way of a prerogative Writ. 78 NLR 35, 77 NLR 313, 71 NLR 356.

In all the above circumstances we reject and dismiss the petitioner's application for relief for a *Writ of Mandamus*. However we are not inclined to make an order for costs

EKANAYAKE, J. (P/CA) – I agree.

Application dismissed.