IN THE SUPERIOR COURT OF JUDICATURE

IN THE SUPREME COURT

ACCRA- 2011

CORAM: ATUGUBA, AG. CJ [PRESIDING]

DATE-BAH, JSC
ANSAH, JSC
BONNIE, JSC
AKOTO-BAMFO [MRS.], JSC

CIVIL APPEAL

NO. J4/31/2011

14TH MARCH, 2012

KWABENA ABOAGYE - - - PLAINTIFF/APPELLANT/APPELLANT

VRS

1. **THE CONTROLLER &**
   ACCOUNTANT GENERAL
2. **THE ATTORNEY-GENERAL - - - DEFENDANTS/RESPONDENTS/**
   RESPONDENTS

J U D G M E N T.

DR. S. K. DATE-BAH JSC:

The plaintiff is a trained teacher who was employed by the Government of Ghana, through the Ghana Education Service, an agency of the Ministry of Education, in 1966. After serving in the Ghana Education Service till 1968, he was granted study leave without pay to study for an undergraduate degree at the University of Ghana, Legon. Upon completion of his degree in 1971, he was employed at the Ministry of Finance and Economic Planning from June to August 1971, at the Ghana Water and Sewerage Corporation from September 1971 to June 1976, at the National Investment Bank from May 1976 to October 1978 and, finally, at the Ghana Cocoa Marketing Board, from November 1978 to October 1979. The plaintiff's last employer in the public service was the Ghana Cocoa Marketing Board, which terminated his employment because of a reorganization that the corporation had undertaken.

On attaining the retiring age of sixty in 2002, the plaintiff applied to the Ghana Education Service ('GES')for the payment of his pension and end-of-servive benefits. Because the Ghana Cocoa Marketing Board had not redeployed him after his termination, the plaintiff applied in 2005 to the Head of the Civil Service through the Director-General of the GES for condonation of break in service. The plaintiff averred in his Statement of Claim that the Head of Civil Service granted the condonation of break in service through a letter dated 12th April 2005, thus making the plaintiff's service continuous from 1966 to 10th November 2002. The actual text of the letter of condonation did not, however, support this assertion since that letter written by one W.K. Kemevor, on behalf of the Head of the Civll

Service, and which was delivered to the High Court in compliance with Order 21 of the High Court (Civil Procedure) Rules 2004 (CI 47) relating to discovery of documents stated that (at p. 34 of the Record):

> "I wish to convey approval for the condonation of the break, which occurred in the service career of Mr. Kwabena Aboagye from 1971 to 1980 when he worked with the Ministry of Finance and Economic Planning, the Ghana Water and Sewerage Corporation, the National Investment Bank and finally the Ghana Cocoa Marketing Board.
>
> Consequently, Mr. Kwabena Aboagye's service career is made continuous for pension purposes from 1966 to 1980."

The main controversy in this case relates to whether the condonation extends to 2002, as averred by the Plaintiff, or whether it extends only to 1980, as expressly indicated in Mr. Kemevor's letter of 12th April, 2005.

The plaintiff's case, as set out in his Statement of Claim, was that: the condonation granted him extended to 10th November, 2002; that upon receipt of the condonation letter, he had written to the Chief Treasury Officer of the Controller and Accountant-General's Department to process his retirement benefits for payment; that the First Defendant had written to the plaintiff's previous employers and had been given written responses about the current position, equivalent salary scales of the plaintiff for computation of the plaintiff's pension and end-of-service benefits; that the advice of the Attorney-General, when sought by the First Defendant, was that the plaintiff's pension was to be paid with any advantageous increases due to the plaintiff, but the first defendant, had failed to pay the plaintiff.

The plaintiff further contended that when he lost his employment with the Government of Ghana as a result of the reorganization of his particular office, he was not redeployed, even though he was available for redeployment. The plaintiff averred that he had written several petitions on this matter, including to the President of the Republic. He denied that, as falsely claimed by the first defendant, he had already claimed benefits from his previous employers. He further contended that even if he had collected his provident fund benefits from his previous employers, he would still be entitiled to his pension and other end of service benefits. The plaintiff claimed that on the coming into force of the Social Security and National Insurance Trust Law, he had opted in writing to remain a pensionable employee under the Chapter 30 (Cap 30) scheme. It was his case, therefore, that he was entitled to retire from the service with his full earned awards.

The reliefs that he sought were specifically (as stated in his Statement of Claim):

a. "A declaration that Plaintiff retired under Cap 30 upon reaching the age of sixty (60) years
b. A declaration that Plaintiff is entitled to pension and end-of-service benefits applicable to him from Ghana Cocoa Board under Cap 30
c. An order that the Plaintiff's period of pension and end-of-service benefits be calculated from 1966 to 10th November 2002 when he turned 60 years and would have thus retired from the service.
d. An order that Plaintiff's pension and end-of-service benefits be as calculated above be paid to him by the Defendants forthwith.

e. Interest at the statutory rate on monies due to the Plaintiff from the Defendants from 10th November 2002 to date of final payment.
f. General Damages."

These reliefs were an expansion of the reliefs endorsed on the Writ of Summons which were as follows:

a. "A declaration that Plaintiff is entitled to pension and end-of-service benefits applicable to him from Ghana Cocoa Board and retired under Cap 30 upon reaching the age of sixty (60) years
b. A declaration that the Plaintiff enjoys a condonation of his service from 1966 to 1982
c. An order that the Plaintiff's period of pension be calculated from 1966 to 10th November 2002 when he turned 60 years and would have thus retired from the service
d. An order that Plaintiff's pension, calculated under paragraph c above be paid to him by the Defendants forthwith."

Presumably, the Plaintiff intended that his Statement of Claim should be taken as having amended the reliefs as endorsed on his Writ of Summons.

The defendants in their Statement of Defence dated 4th February 2008 denied that the plaintiff was entitled to any of the reliefs endorsed on his writ of summons. More specifically, they averred that when the plaintiff's appointment was terminated he had failed to seek redress then and so no action could arise at the time of the statement of defence (which was after 29 years) on account of the statute of limitation. They further averred that the plaintiff had failed to join the Civil Service after his termination at the

Ghana Cocoa Board. Though they admitted Mr. Kemevor's letter of 12th April 2005, they denied that the letter made the plaintiff's service continuous from 1966 to 2002.

At the close of pleadings, counsel for the plaintiff applied to have the suit disposed of by legal argument. Accordingly, no oral evidence was adduced. The trial judge, Asante J., indicates in his judgment, delivered on 22nd December, 2008, that the plaintiff's counsel stated that, with coming into force of the Pensions and Social Security (Amendment) Act 1975 (SMCD 8), the plaintiff, who was then a pensionable officer, exercised the option to remain under Cap 30. Counsel argued that it was this option which informed the plaintiff's decision to wait until he reached the age of 60 years before making a claim for his pension. The learned trial judge indicated that counsel could not produce any proof of the exercise of this option, although he informed the court that he would furnish it with such proof.

The learned trial judge concluded that the letter of condonation dated 12th April 2005 did not support the claim made in paragraph 10 of the plaintiff's Statement of Claim that the letter made the plaintiff's service continuous from 1966 to November 2002. The learned trial judge stated (at p.67 of the Record):

> "My understanding of the letter is that from 1971 to 1980, the plaintiff worked outside the Ghana Education Service ie outside the Civil Service and since all the establishments with which he worked are all government related, the head of the Civil Service condoned the break in service and approved that he be paid his pension from

1966 when he was a Teacher up to his last post at the Cocoa Marketing Board in 1980.

Nowhere in this letter has it been stated that the period of 23 years when the plaintiff stayed at home after his termination because of the reorganization should be condoned and pension paid to him for that period as falsely claimed in paragraph 10 of the statement of claim."

The learned trial judge then relied on a practice direction of the Head of Civil Service, according to which those who held a pensionable grade as of 1st January 1972 and whose office had been abrogated as a result of re-organisation could apply for condonation. In the circumstances, he found that the plaintiff was entitled to a condonation in break of service as set out in the letter of 12th April 2005. He therefore held that the Plaintiff is not entitled to a pension calculated from 1966 to 2002. He however declared that the plaintiff is entitled to a pension benefit calculated from 1966 to 1980, as granted by the letter from the Head of the Civil Service. He therefore ordered that the plaintiff's pension from 1966 to 1980 be calculated and paid to him forthwith.

The plaintiff then applied for a review of this judgment. In his affidavit in support of his application for review, the plaintiff contended that he did not break service from 1966 to 1980 since all his employers in that period were within the Public Service. He insisted that the break in service occurred in 1980 when in January the Cocoa Marketing Board stopped paying him because of the termination of his appointment on the ground of re-organisation. He contended that the condonation he applied for was not to

aggregate his years of service outside the civil service, as stated in the judgment of the leaned trial judge. The affidavit further stated:

7. "That condonation of break in service as explained in paragraph (1) of the practice direction dated 31/01/2008 and titled "Condonation of Break in Service" when granted treats the break in service in 1980 as if it never occurred thus making Plaintiff service continuous from 1966 up *(sic)* November 2002 when Plaintiff attained the compuisory retiring age of Sixty.
8. That the Director of Human Resource and Manpower Department's letter dated 12/04/05 titled "**TRANSFER OF SERVICE FROM THE GHANA EDUCATION SERVICE – MR. KWABENA ABOAGYE REGD. NO 1482/05"** which made Plaintiff's service from 1966 to 1980 continuous for pension purposes was an obvious error in that there was no break in service from 1966 to 1980.
9. That it was when the 1st Defendant's attention was drawn to the obvious error in the Director of HRMD's letter dated 12/04/05 that the 1st Defendant sought the Attorney-General's opinion which brought about Justice VCRAC Crabbe's advice letter dated 2/11/05.
10. That as in paragraph 4(11) of the practice direction all what the Plaintiff was required to support his application for condonation of break in service was that his break in service was honourably done and in the case of the Plaintiff his

appointment was terminated due to re-organisation without being re-deployed though he was available.

11. That the Plaintiff never sought as part of his reliefs as endorsed on the Writ of Summons or stated in the Statement of Claim a declaration that Plaintiff enjoys a condonation of his service from 1966 to 1980 as captured in page 2 of the judgment in that there was no break in service."

The defendants opposed the application for review on the ground that the plaintiff's affidavit in support did not disclose anything new beyond what was argued before the delivery of judgment.

Counsel for the plaintiff in arguing the application for review indicated that the basis for the plaintiff's application was that the court had based its judgment on an erroneous letter, namely the letter of condonation. (See p. 103 of the Record). He made the point that the condonation could not have been for a period during which the plaintiff was working in the public sector. The condonation letter had therefore misled the court into an error. He therefore prayed the court to correct its erroneous finding by extending the period of condonation to 2002 when the plaintiff attained the age of sixty years. Counsel for the defendants in response argued that there was no error in the letter of condonation and that counsel for the plaintiff had not satisfied the preconditions for the grant of a review by the High Court. He argued that the proper forum for the plaintiff's grievance would be the Court of Appeal.

His Lordship Asante J., in his ruling, delivered on 19th March 2009, dismissed the application for review, stating that his grant of condonation in his judgment was based on the letter of condonation written on behalf of the Head of the Civil Service which had expressly granted a condonation from 1966 to 1980. He rejected the plaintiff's submission that the Head of Civil Service made a mistake in indicating that the condonation was from 1966 to 1980. He indicated if there was any error in that letter, it was the responsibility of the Head of the Civil Service to correct it. Such correction could not be effected by way of a review of the High Court's original judgment.

The plaintiff appealed to the Court of Appeal against both the judgment and the ruling of Asante J. Being dissatisfied with the dismissal of his appeal in the Court of Appeal, he has further appealed to this Court. Although the plaintiff had been represented by counsel in the courts below, in this court he appeared in person and represented himself. The plaintiff's grounds of appeal were:

1. "The Court of Appeal misunderstood the term "Condonation of break in service" as provided in Regulation 15(2)b by misconstruing the term "Condone" to mean "Conjoin", thus delivering a judgment that cannot be supported by the legal arguments made at the trial High Court as found in pages 76-88 of the appeal record.
2. The Court of Appeal erred by failure to correct the mistake in the Condonation letter from the Head of Civil Service found at page 34 of the appeal record as an issue put before the Court

with an Exhibit to support such needed correction at pages 38-40 of the appeal record.

3. The Court of Appeal erred in the face of the fact in the appeal record in ruling that the Appellant had breaks in his service career when at page 33 of the appeal record Appellant provided clearly that Appellant's service career was broken only once in 1979/80 as a result of termination of his appointment by reason of re-organisation.
4. The Court of Appeal erred in stating that the Appellant asked for condonation of his break in service from 1966 to 2002, when he clearly asked for condonation of the break in his service career from 1980 when his appointment was terminated by reason of re-organisation to the year 2002 when he attained the compulsory retiring age of sixty for the purpose of calculating the Appellant's pension and end-of-service benefits.
5. The Court of Appeal erred by incorrectly interpreting the Attorney-General's letter in a vacuum, that is, without reference to the contents of the letter of the Controller, dated 29th September 2006 to which the Attorney-General's letter was directly addressing.
6. The Court of Appeal erred in taking the Appellant's demand for pension payment to be, as if, it is payment of salaries over the condoned period and so made Appellant seem to be demanding payment of salaries over the period he was not working for the Civil or Public service.

7. The Court of Appeal erred in not awarding interest on the Appellant's pension payment to restore eroded value due to the delay in payment by the Controller & Accountant-General pension which compelled the Appellant to institute the instant action.
8. The Court of Appeal erred in declaring that the Appellant is not entitled to damages and not ordering the Appellant to prove same when the Court found that the Appellant was entitled to pension and condonation but had not been paid since November, 2002 when Appellant attained the age of sixty.
9. The Court of Appeal erred in not awarding costs in favour of the Appellant, in that, it is not required of a public officer who has satisfied the necessary and sufficient conditions for pension payment to go to Court before being paid."

The plaintiff/appellant/appellant argued grounds 1,2,3 and 4 together. He contended that between 1966 and 1980 he was in the public service without any break and therefore was qualified on his own continuous service for pension under Cap 30. He did not need any condonation to enjoy a pension in relation to those 14 years. The condonation of break in service granted by the Head of the Civil Service had to be construed rather as relating to the break in his service that occurred from 1980 till 2002 when he reached the compulsory retirement age of 60.

I am afraid I have a logical difficulty with this argument. Break in service connotes that there are at least two periods of service with a

gap in between them. However, in 2002, the plaintiff was manifestly not in the employment of the civil nor public service. I cannot, therefore, understand how it can be meaningfully argued that there was a break in service between 1980 and 2002. The plaintiff's employment in the public sector terminated at the end of 1979 and no amount of clever argumentation can mask that salient fact.

I sympathise with the view of Asante J. in the trial court, expressed in his ruling on the review application, when he indicated that if there was an error in the letter of condonation the responsibility lay with the issuer of the letter to correct it and not for the courts to rectify the alleged error. As far as I am concerned, this is a simple matter that has been unnecessarily dragged through the court system. The letter of condonation by its express and unambiguous terms relates to the period between 1966 and 1980. If this was erroneous what needed to be done was for the issuer of it to withdraw it and substitute another letter for it. This has not been done. This issue of fact for me concludes this issue. There simply is no letter of condonation covering the period 1980 to 2002 on the record. Accordingly, I am unable to hold that the period between 1980 and 2002 which was manifestly spent by the plaintiff outside the public service has been condoned. Indeed, if the Head of Civil Service were to issue a letter of condonation for that period, an issue would arise as to whether he has the authority to do so, in the light of my understanding of break of service outlined above. However, that

issue does not arise on the actual facts of this case. I would accordingly dismiss grounds 1 to 4 as unmeritorious.

The plaintiff/appellant/appellant argued the rest of his grounds (5 to 9) together. In arguing these grounds, the appellant purported to introduce fresh evidence through his Statement of Case by annexing 7 attachments "in order to be able to demonstrate to the Supreme Court how and why the Court of Appeal erred in interpreting the letter of the Attorney-General, dated 29th November, 2005, without having the Controller's letter dated 29th September, 2005 and reading the contents of the letter." This introduction of fresh evidence through the Statement of Case is impermissible, by the Supreme Court Rules, and it is therefore disregarded. According to Rule 15.6 of the Supreme Court Rules (CI 16):

> "6) The statement of case of each party to the appeal-
>
> (a) shall set out the full case and arguments to be advanced by the party including all relevant authorities and references to the decided cases and the statute law upon which the party intends to rely; and
>
> (b) in the case of a respondent may include a contention that the decision of the court below be varied."

Accordingly, also disregarded are all unproven allegations of fact which the appellant introduced into his Statement of Case. The Statement of Case may only rely on facts established by evidence already on record.

The letter from the Attorney-General that is referred to is in fact dated 2nd November 2005 and is one of the documents filed by the plaintiff in the court below. Its text is as follows:

"**PENSION PAYMENT – MR. KWABENA ABOAGYE**

May I refer to your letter dated the 29th September, 2005.

I am directed by the Attorney-General to inform you that Mr. Kwabena Aboagye's entitlement to pension depends on the law applicable to him at the time of his retirement from the Public Services. Once that right had accrued, subsequent changes in the law would not affect the accrued right, which has now become, as it were, a vested interest, unless the law specifically applies to take away the accrued right. In the circumstances of this case, Mr Kwabena Aboagye should be paid.

a) the pension to which he is entitled as a public officer at the time of his retirement from the Public Services, and
b) any advantageous increases in the quantum of the pension payable.

VCRAC CRABBE

COMMISSIONER

STATUTE LAW REVISION

MR. CHRISTIAN SOTTIE

CONTROLLER AND ACCOUNTANT-GENERAL

P O BOX M79

ACCRA"

In my humble view, this letter from the Attorney-General does not assist the appellant in securing the reliefs claimed in his Statement of Claim. It can in no way be interpreted to support the plaintiff/appellant/appellant's view of the effect of the letter of condonation. I do not, thus, consider any of the grounds 5 to 9 justify a reversal of the judgment of the Court of Appeal.

I would, therefore, dismiss this appeal as unmeritorious.

(SGD) DR. S. K. DATE-BAH
JUSTICE OF THE SUPREME COURT

W. A. ATUGUBA, J.S.C:

This case hinging on condonation of Labour Services has reached this court as *res integra*. I therefore wish to venture some views on it.

As the facts have been masterly stated by my able brother Dr. Date-Bah J.S.C., I will not repeat them except where necessary.

As I understand the appellant's stance it is that break in service needing condonation for the purposes of pension rights does not arise at all to a series of services or employments engaged in so long as they are in the Public Service. He contends that break in service relates to premature disruption of an employee's service career when he has not reached the retiring age of 60 years, occasioned by an event such as loss of job due to redundancy or reorganisation of the employer's business. It is his further contention that in such circumstances the gap between the premature loss of job and the date of retirement can be bridged by the grace of condonation by the Head of Civil Service, thus enabling the employee to earn his full retirement benefits from the date he first worked in the Public Service up to the date he attained the age of 60 years.

No judicial authority has been cited by any of the parties, no doubt because as I pointed out earlier it is *res integra* in the Ghanaian judiciary. The appellant's range of permissible condonation is rather startling. There seems to be little wonder that his grant of condonation *ex facie* exhibit M4 is restricted to the period 1966 to 1980 when the appellant rendered various fractured services in the Civil and Public Services of Ghana. He contends that the said stated period of condonation is a clear error based on his contentions as to the nature and ambit of condonation earlier stated *supra*. Were his contentions as to error plausible I should be disposed to read the letter granting him the condonation *ut res magis valeat quam pereat*, it being trite law that the rules for the construction of statutes are very much the same for documents. Such a course has been pursued often. See *Larbi v. Cato* (1959) GLR 35.

However in *Woledzi v. Akufo-Addo* (1982-83) 1 GLR 421 at 439, Cecilia Koranteng-Addow J lamented the situation of a former supervisor of mails at the Posts and Telecommunication Corporation thus:

> "*The plaintiff is now unemployed. He received no retiring benefits, after fifteen years of service. He said he received only ¢150 on his retirement because he had not reached the retiring age*. He said *his contemporaries who are still at the job are now senior inspectors receiving annual salaries of ¢4,360.* This is a new scale which came into effect in 1970. He was 41 years when he was compulsorily retired. He is married with seven children, but he is completely incapacitated by this accident. In July 1967, when a medical report was issued on him, Dr. K. G. Korsah found him to be 70 per cent incapacitated. In 1979, when he conducted a further examination to assess his improvement, he found that his condition had retrogressed, and he assessed incapacity at 100 per cent. There is total blindness in the right eye, with pains in it…" (e.s)

Continuing at 440 her Ladyship said:

> "The plaintiff is deformed; the squint and the twisted mouth have deformed him. He is a man who lost his self-confidence due to his present appearance. In his present condition there is little he can enjoy; a man who is so affected and afflicted with pain can hardly be said to enjoy full amenities of life. *He has also lost his pension rights*.
>
> Lastly, his inability to make a living to support himself and family –he is 54 years old; he was only 42 at the time of the accident.

> Considering the heights he would have attained in his job if he had not been disabled by this accident, he should be compensated for that loss. *His damages should take seriously into account his pension rights which he lost and his total incapacity*. …"

Again in *Korley v. State Construction Corporation* (1982-83) 1 GLR 576 at 584 Cecilia Koranteng-Addow J lamenting the predicament of a 50 years old man who worked with the State Housing Corporation as a carpenter from 1958 to 1973, said:

> " … He has suffered pain and loss of amenities. His pain has persisted from the time of the accident and it is still continuing, he has lost amenities of life. In his present condition, the plaintiff cannot do the things he enjoyed doing before the accident. He cannot stand on his feet, and he walks with a lot of strain. *The plaintiff undoubtedly retired before reaching the retiring age, so he must have lost some earnings*."

In these two grim cases the parties were represented by experienced counsel and it seems rather awkward that there is no hint in the computation of damages for prospective loss, of the kind of condonation that the appellant claims so confidently.

I have also looked at the renowned work, **Industrial Law** 3rd Edition by I. T. Smith & J. C. Wood but have found nothing that supports the appellant's

contention. The discussion that comes closest to this matter is at page 166, 173 to 177 and 317 to 319, dealing with continuity of service and pension rights. It is clear that the English notion of continuity of service is similar to Ghana's scheme of condonation but nothing therein comes near the appellant's claim in this case.

The instance of condonation of service which is very similar to the matter at hand I have come across in respect of South Africa is one effected statutorily along the lines of condonation of service granted the appellant herein. It is as follows:

ACT

To give effect to a petition granted by the National Assembly condoning the interrupted service of a certain individual for the calculation of pension benefits payable to his spouse under the Government Employees Pension Fund Law, 1996 (Proclamation No. 21 of 1996); and to provide for matters connected therewith.

BE IT ENACTED by the Parliament of the Republic of South Africa, as follows: -

Interpretation

1. In this Act, unless the context indicates otherwise, a word or expression to which a meaning had been assigned in the Government Employees Pension Fund Law, 1996 (Proclamation No. 21 of 1996, has the meaning assigned to it in that Act

Condonation of Interrupted Service

2. (1) *Despite anything to the contrary in any other law, the service of Advocate Abraham Gerhardus Kellerman, as rendered to the former Department of Justice for the period 1 January 1980 until 31 January 1991 and for the period 1 September 1991 until 6 September 2000, must be regarded as continuous service of 20 years for the purposes of calculating the pension benefits due to his surviving spouse, Chloe Jemima Kellerman*, under the Government Employees Pension Fund Law, 1996, Proclamation No. 21 of 1996), and the Rules issued under that Law.

(2) The benefits to which his spouse is entitled to in terms of subsection (1) is payable from the date of his death on 6 September 2000, and is payable by the Government Employees Pension Fund.

(3) The benefits payable under subsection (2) must be paid to his spouse within 60 days of the commencement of this Act.

Compensation of Fund

3. (1)(a) The employer must pay a single one-off amount calculated by an actuary appointed by the Fund as compensation in full for the liability incurred by the Fund in terms of section 2.

(b) In calculating the liability contemplated in subsection (1), the actuary must take into account –

(i) any contributions paid to the Fund or previous fund, by the employer or Advocate Abraham Gerhardus Kellerman, not paid

to Advocate Abraham Gerhardus Kellerman on termination of his services on 31 January 1991; and

(ii) interest on the contributions contemplated in subparagraph (i).

(2) The compensation contemplated in subsection (1) is a direct charge against the National Revenue Fund.

Short Title

4. This Act is called the Government Employees Pension Fund (Condonation of Interrupted Service) Act, 2008." (e.s.)

Finally I refer to the Indian case decided by the High Court of Judicature at Bombay, Nagpur Bench, Nagpur, intituled *Vasant Heraji Kadu v. The State of Maharashtra & Ors*, dated Friday, January 28, 2011. The facts and decision thereof are as follows:

"The petitioner having acquired the qualification of B. Sc. B. T. was appointed as Assistant Teacher in Mahatma Ghandi Vidyalay, Armori on 18.10.1956. He was confirmed there and thereafter was promoted as Head Master in the same school on 1.4.1958. However on 1.5.1961 *the services of the petitioner were terminated* by paying three month's salary, he being permanent employee. *This was the first break in his service*. Thereafter on 1.6.1961 he was appointed as Head Master in Katol High School, Katol. *On 6.4.1969 he resigned from the said post*. His resignation was accepted on 1.10.1969 and

was relieved on 6.10.1969. *This was the second break in his service.* Thereafter he was appointed as Assistant Head Master in temporary post in Tidke Viyalay, Nagpur on 25.6.1972. *This was the third break in his service*. Thereafter he was appointed as Head Master in Pragatik Vidyalay on 3.7.1972. His services were terminated in 30.4.1974. *This was the fourth and the last break in his service. Lastly he was appointed as Assistant Teacher in Yuganter Mahila Vidyalay, Nagpur* on 14.8.1976 and *continued there till he retired on attaining the age of supernnuation (i.e. 60 years)* on 30.9.1968. *Thus, he rendered total service of 32 years including the break of about 4 years 3 months and 15 days.* All these schools wherein the petitioner served were aided and recognized and the petitioner served there on full time basis and was permanent employee.

3. *Even before his retirement, the petitioner made a representation to the Education Officer, Zilla Parishad, Nagpur on 30.11.1987 for condoning the said break in his service period*. The case of petitioner was also recommended by the Education Officer as well as Deputy Director of Education to the Government. However, by communication dated nil July 1992 *the Education Department informed the petitioner its regret that the break in service during the period from 1.5.1974 to 13.8.1976 cannot be condoned as per the prevailing rules.* Thereafter the petitioner made several representations to the secretary, Education Department, Bombay. However, the communications dated 4.1.1998 the petitioner was

informed that the break in his service cannot be condoned. The petitioner has challenged those communications.

4. According to the petitioner the breaks in service of Shri B. L. Deshmukh and Shri Jagdish Khebudkar were condoned by the state. However, the petitioner was discriminated and *has been denied the benefit of his long service while giving pensionary benefits to him.*

5. Respondents No 1 and 3 as well as respondent No 4 filed separate returns. According to them there has been no discrimination as alleged by the petitioner because the petitioner's case cannot be equated with that of Shri B.L. Deshmukh and Shri Jagdish Khebudkar. *The breaks in services in those two teachers were condoned because under normal rules they were no entitled to any pension and in order to allow them to draw at least minimum pension, the break in service was condoned as special cases.* The policy of the state Government is not to condone break in service in order to enhance pension. Thus the petition is not entitled to the relief sought.

6.We have heard Shri A D Mohagaonkar, Advocate for the petioner and Shri Ahirkar, AGP for the respondents. Shri Mohagaonkar invited our attention to rule 70.1 of the secondary school code under the caption "Pension/Provident Fund". *It provides that every employee on a full time basis in aided and recognized school who was appointed before 1st April 1966 and has exercised in writing his opinion for a pension scheme, shall be eligible to get pension as per rules prescribed by the Government.* Shri Mohagaonkar further

invited our attention to Annexture 34 of Secondary School Code which provides for “Pension Scheme for employees in the Non-Government Secondary Schools”. Clause (1) of the said Scheme provides that:

> “ Government directs that the pension gratuity and other retirement benefits admissible to the Maharashtra State Government servants under the Revised Pension Rules, 1950 as amended from time to time, should be made applicable to full time teaching staff in recognized and aided Non-Government Secondary Schools in the state who retires on or after 1st April 1966.”

Clause 7 of the Scheme provides that:

> “*In computing the length of qualifying service for pension under this scheme, all previous circumstances beyond the control of the teacher. If the services of a teacher have been terminated on disciplinary grounds after following the prescribed procedure, such break in service cannot be condoned* and the services rendered by the teacher in the school from which his services are so terminated on disciplinary grounds will not account for pension.”

8. Shri Mohagaonkar also invited our attention to Appendix A

which is an Accompaniment of Government Resolution , Education Youth Services Department No PEN 1076.81126 (1491) XXII dated 12.11.1976 *which provides that breaks after 30.9.1976 in respect of*

teachers should not be condoned. The cut-off date prescribed by the state for condoning the break in service is wholly irrational and it results in discrimination between the employees and it has no nexus with the object sought to be achieved by the pension scheme. Perhaps that is why by Circular No: PEN-1088/120973/(582)/Sec – Edu dated 10.5.1989 of the Secretary of Department of Education was empowered to condone the breaks in service of teachers even after 30.9.1974.

9.Shri Mohagaonkar pointed out that in case of the petitioner all those contentions are fulfilled and hence there was no difficulty in condoning the break in his services for the period from 30.4.1974 to 14.8.1976 which is of two years 3 months and 13 days.

10.*The reasons put forth by respondents for not condoning the break in service of the petitioner are (1) that the policy of the state is not to condone the break in service in order to enhance the pension and (ii) that the cases of Shri B.L. Deshmukh and Shri Jagdish Khebudkar cannot be equated with that of the petitioner, because those two employees would not have been entitled to any pension unless the break in their services was condoned and hence the same was condoned as special cases. We are unable to find any logic in these reasons.* It is the policy of the State to give pension to every employee on a full- time basis in aided and recognized schools appointed before 1st April, 1966, there is no question of any policy of the State not to condone break in service in order to enhance pension.

11.So far as equating the case of the petitioner with that of Shri B L Deshmukh and Shri Jagdish Khebudkar it is true that they cannot be equated because in the absence of condonation or break in their services, those two employees would not have been entitled to draw any pension. However, this does not mean that if because of condonation of break in service of the petitioner he is benefited by getting more pension the break in service should not be condoned. *It may not be forgotten that the petitioner rendered 32 years of total service including break of 4 years, 3 months and 15 days. As the last break in service of the petitioner is not condoned, his pension has been calculated on the basis of his service of about 12 years only whereas if the last break in the service of the petitioner is condoned he would get benefits of earlier 16 years of service. Since the last break in the service of the petitioner for 2 years, 3 months and 13 days is not condoned he gets pensionable service only from 14.8.1996 to 30.9.1988 that is for about 12 years whereas if the last break in the service of the petitioner is condoned he would get benefits of earlier 20 years of service for calculating pension and pensionable benefits. In our view the State was not justified in refusing to condone the last break in service of the petitioner depriving him all the benefits of the long service. Such a decision is against public policy.* We are surprised to see that the last break in the service of the petitioner was not condoned by the State despite the authorities below having recommended the case of the petitioner for condonation for break in service.

12. *In view of the above reasons, we find that the communication by the State dated July, 1992 so also the communication dated 4.1. 1998 and 2.3.1998 are liable to be quashed and set aside.*" (e.s.)

Quite clearly the South African and Indian legal position is that breaks of service (within the Public Service) require condonation and therefore it will be absurd to think that a person who suffered redundancy can also get the same condonation even though between his last employment and his retiring age he did not work in any employment at all.

From all the foregoing, I am convinced that our law on condonation is *in pari materia* with that of England, South Africa and India and that as stoutly stated by my brother Dr. Date-Bah JSC of legendary ability, condonation relates to breaks between two or more employments and not otherwise and that the period of condonation of service granted the appellant is 1966 to 1980 and not 1966 to 2002. Therefore there is no error in the expression of the period of condonation of service intended to be granted and was granted to the appellant.

I would therefore also dismiss the appeal.

(SGD) W. A. ATUGUBA

ACTING CHIEF JUSTICE

(SGD) J. ANSAH
JUSTICE OF THE SUPREME COUR

(SGD) P. BAFFOE – BONNIE
JUSTICE OF THE SUPREME COURT

(SGD) V. AKOTO-BAMFO (MRS.)
JUSTICE OF THE SUPREME COURT

<u>COUNSEL;</u>

APPELLANT APPEARS IN PERSON.

CECIL ADADEVOH [WITH HIM APPIAH OPARE] FOR THE RESPONDENTS.