

IN THE COURT OF APPEAL OF THE DEMOCRATIC SOCIALIST
REPUBLIC OF SRI LANKA

In the matter of an application for a Writ of Certiorari under and in terms of Article 140 of the Constitution of the Republic.

C.A./Writ Application No.468/08
(Arbitration No.3126)

S.P. Serasinghe,
No.17, Kirula Road,
Colombo 05.

Applicant

Vs

State Mortgage and Investment Bank
No.269, Galle Road
Colombo 3.

Respondent

AND BETWEEN

State Mortgage and Investment Bank
No.269, Galle Road,
Colombo 3.

Petitioner

01. Hon. V. Vimalarajah
No.2/6B-S
Manning Town Flats
Colombo 08.

02. Hon. Athauda Seneviratne
Former Minister of Labour Relations
and
Foreign Employment, 2nd Floor, Labour
Secretariat, Colombo 05.

03. Mahinda Madihahewa
Former Commissioner of Labour,
Labour Secretariat,
Colombo 05.

04. S.P. Serasinghe
No.17, Kirula Road,
Colombo 05.

05. Registrar,
Industrial Court,
Labour Secretariat,
Colombo 05.

06. D.S. Edirisinghe
Commissioner General of Labour,
Labour Secretariat,
Colombo 05.

07. Hon. Attorney-General,
Attorney-General's Department,
Colombo 12.

Respondents

BEFORE : **S. SRISKANDARAJAH, J (P/CA)**

COUNSEL : Priyantha Jayawardena
for the Petitioners,
Yuresha Fernando SC
for the 2nd, 3rd, 6th, and 7th Respondents.
S.Thalaysingam
for 4th Respondent

Argued on : 03.03.2011

Decided on : 18.06.2012

S.Sriskandarajah.J,

The Petitioner Bank in this application has sought a Writ of Certiorari to quash the award made by the 1st Respondent published in Gazette (Extraordinary) No1542/26 dated 27/01/2008. The said award was made by the 1st Respondent on a reference made by the Minister of Labour acting in terms of Section 4(1) of the Industrial Disputes Act, as amended, on the 31st August 2005. The reference made to the 1st Respondent for arbitration states as follows:- 'Whether it is justified to treat Mrs. S.P. Serasinghe who was in the service of the State Mortgage and Investment Bank as having vacated her employment in the Bank with effect from 1/09/2003 and, if not justified, to what relief she is entitled'. It is common ground that the Applicant employee joined the services of the predecessor of the Petitioner Bank on 1st July 1970. Thereafter she has been on no

pay leave for 21 years taken from time to time on account of her husband's overseas assignment. She was granted no pay leave up to 31st January 2003 by the Board of Directors of the Bank. She was requested to report for duty on 1st February 2003, as decided by the Board of Directors. The Petitioner stated that the employee failed to report for duty on the said date, and she made a request through the Secretary, Ministry of Finance, requesting further extension of no- pay leave. The Board of Directors of the Petitioner Bank reconsidered its earlier decision and granted her no-pay leave up to 31st August 2003. At the meeting held on 10th April 2003, the employee was informed to report for duty from 1st September 2003, but the employee once again failed to report for duty. On 1st September 2003, the Board of Directors of the Bank decided to treat the employee, the 4th Respondent, as having vacated her post with effect from 1st September 2003. As the 4th Respondent has failed to report for duty on or before the date specified, the Petitioner submitted that it had no alternative other than to treat the 4th Respondent had vacated her post. The 4th Respondent contended that her services had been unjustifiably and unreasonably terminated in contravention of the Cabinet decision contained in Circular No.530/75 dated 10th November 1975, applicable to all spouses of State Officers posted abroad.

The 4th Respondent submitted that in consequence to a directive issued by the Cabinet, she was re-employed by the State Mortgage and Investment Bank. The Petitioner, on the advice and instructions received from the then Minister of Finance and Planning granted the 4th Respondent the required no-pay leave as and when she has to accompany her husband on his posting abroad. Accordingly she was given no pay leave from:

April 1981 to June 1984 - Jakarta, Indonesia - 3 years and 2 months

July 1987 to June 1988, Bank of Thailand - 11 months.

June 1988 to April 1999 - Manila, Phillipines - One Year and 10 months.

April 1990 to September 1992, Kenya - 2 years and 5 months.

July 1995 to December 1998 - Kuwait - 3 years and 5 months.

December 1999 up to 31st October 2005 - Cairo, Egypt.

The 4th Respondent contended that the actual total period of no-pay leave after being re-employed by the Petitioner is 15 years and 9 months.

The Petitioner submitted that the 4th Respondent, by her letter dated 14th August 2003, requested for extension of no pay leave for another 2 months with effect from 31st August 2003. The said request was referred to the Minister of Finance by the Petitioner Bank by letter dated 29th August 2003 and sought his advice in this matter. The Minister of Finance, by his letter dated 4/09/2003 informed the Board of Directors of the Petitioner Bank to make a decision in terms of the applicable procedure of the Bank. In the meantime the 4th Respondent's leave expired on 31/08/2003 and the 4th Respondent did not report for work on 1/09/2003. As the official work rule of the Petitioner Bank stipulates that 3 days unauthorised leave would suffice to treat it as vacation of post, the Board of Directors of the Petitioner Bank took a decision on 16/09/2003 to treat the 4th Respondent to have vacated her post with effect from 1/09/2003. This decision was conveyed to the 4th Respondent by letter dated 17/09/2003.

The Arbitrator in his award has considered the facts placed before him and had come to the conclusion that the decision of the Petitioner to treat the 4th Respondent as having vacated post is unjustified. The Arbitrator has considered the long period of no pay leave that was given to the 4th Respondent on several occasions on her request based on a Cabinet decision. He has expressed concern as to why her last request for extension of two months leave was refused even though she is entitled for no pay leave under the said circular as her husband was still employed in Egypt. The Arbitrator has referred to several judgments of the Supreme Court and the Court of Appeal and has come to the conclusion that the 4th Respondent does not have the required mental

element to vacate her post and the efforts made by the 4th Respondent shows that she wishes to remain in employment. Therefore the Arbitrator had come to the conclusion that the decision made by the Bank to refuse her request for two months no-pay leave, request by the 4th Respondent on the 14th August 2003, and to treat her having vacated post is unfair and unreasonable. The Arbitrator has held in his award that she has not vacated her employment from 1/09/2003.

I agree with the conclusion of the Arbitrator that the 4th Respondent was making every endeavour to be in service and has made the required application for no pay leave based on the Cabinet decision to grant approval to the spouse of an employee who is in employment in foreign mission. The series of correspondence between the 4th Respondent and the Petitioner and the attempts made by the 4th Respondent to persuade the Petitioner through her request, including the relevant Ministers who are responsible for finance and foreign affairs. This shows that the 4th Respondent was ever willing to remain in employment and had made all endeavour and taken all necessary steps to obtain her leave. She is entitled for the said leave on the ground that her husband was still serving in foreign mission, the refusal of her no-pay leave could be considered as unjustifiable and therefore the 4th Respondent cannot be treated as having vacated her employment from 1/09/2003.

The Arbitrator, when considering the reliefs to the 4th Respondent, has considered the age of retirement of the 4th Respondent. The optional age of retirement is 55 years, and the 4th Respondent has reached her 55 years on the 24th of January 2004. She was treated as having vacated post on 1/09/2003 and her monthly salary was Rs.16,954.94 in November 1999. According to the scheme of recruitment the compulsory retirement of the 4th Respondent is at 60 years, but between the age of 55 and 60, option may be exercised by either party, and the extension of service after 55 years is discretionary. It is common ground that the 4th Respondent has not applied for an extension of service after the optional age of retirement, i.e., after 24/01/2004. In that event the 4th Respondent has to retire on 24/01/2004 as her services cannot be

extended without an application for extension. Therefore, even if the 4th Respondent was in service, the 4th Respondent's services would have come to an end on 24/01/2004. Therefore, the 4th Respondent is only entitled for compensation for unlawful termination of her services from 1/09/2003 to 24/01/2004, but the Arbitrator, without taking these facts into consideration had made an award considering the fact that the 4th Respondent would have continued in service until she reaches the compulsory age of retirement, and awarded compensation amounting to Rs.508,648.20 computed on the basis of salary for 30 months. This decision of the Arbitrator is erroneous as the 4th Respondent's services would have in any event come to an end when she reached the age of 55 years on 24/01/2004, as she has not made an application for extension of service. In these circumstances the 4th Respondent is only entitled for compensation for 5 months from 1st September 2003 to 24/01/2004 and, therefore, I quash the order made by the Arbitrator awarding compensation of Rs.508,648.20 and award a compensation computed on the basis of Rs.16,954.94 for 5 months (Rs.16,954 x 5 months = Rs. 84,770/-).

For the aforesaid reason I allow the application for a writ of certiorari with the above variation without costs.

President of the Court of Appeal