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

In the matter of an application for a Mandate in the nature of a Writ of Certiorari under and in terms of Article 140 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

Confifi Beach Hotels (Pvt) Ltd.
33, St. Michael's Road,
Colombo 03.

Petitioner

C.A. (Writ) Application
No.CA/Writ/283/2008

Vs.

1. Inter-Company Employees Union,
   158/18, 9th Lane, Dabare Mawatha,
   Narahenpita,
   Colombo 05.

2. Dr. V. Irvin Jayasuriya,
   50/20, Sumudu Uyana,
   Pubudu Mawatha,
   Mattegoda,
   Polgasowita.

3. Hon. Athauda Seneviratne,

Hon. Minister of Labour Relations
and
Manpower Development,
Labour Secretariat,
Narahenpita,
Colombo 05.

Respondents

BEFORE	:	**S. SRISKANDARAJAH, J (P/CA)**
COUNSEL	:	Dinal Philips PC for the Petitioners, Ms.D.Tilakawardena SC for the 3rd Respondents.
Argued on	:	21.01.2011
Decided on	:	11.06.2012

S.Sriskandarajah.J,

The Petitioner in this application has sought a Writ of Certiorari to quash the award of the 2nd Respondent dated 27th of September 2007. In the said award the Arbitrator has held that recovery of service charge already paid to the employees by the Respondent after a lapse of time is unfair and unjust and had made an order to the Respondent Hotel (Petitioner) to pay back the total amount of the service charge that had been recovered from the employees, and that this payment be completed by the Respondent within 2 months from the publication of this award in the Sri Lanka Gazette.The said award was published in Gazette No.1523/24 dated 15th November 2007. It is common ground that the said award was not repudiated under the Industrial

Disputes Act at any time. The dispute between the Petitioner Company and the Respondent Trade Union that was referred for arbitration was as follows:-

"Whether the recovery of service charge after a lapse of several years that was paid to the employees of Confifi Beach Hotel, Beruwela, is justified and, if not, to what relief the said employees are entitled."

In the said Arbitration Inquiry evidence was led by both parties. The position taken up by the Respondent Union before the Arbitrator was that under the Contract of Employment, its members are entitled to service charge and the Company is not entitled to deduct the service charge that had been paid to the employees. The position of the Petitioner is that an employee is not entitled to receive service charge that was never recovered by the employer since service charge, by its nature, is a payment collected from customers and not a payment that the employer is obliged to pay out of pocket. The Petitioner's obligation under the respective contract of employment is to duly distribute among the employees service charge collected from customers. This obligation was, at all times, duly fulfilled by the Petitioner.

The facts of this case reveal that it is an established practice that a service charge amounting to 10% of the full amount is levied from guests at hotels (and most hotels) on food and drink consumed by the guest. The service charge so levied is shown in the relevant invoice and is added to the total bill. The total service charge for a month is calculated on sales generated during that month. The total service charge so collected is subsequently distributed among the employees of the hotel on a monthly basis. At the Petitioner's hotel, the practice was to deduct 10% from the total service charge levied for that month prior to distribution among the employees on account of breakages and other such expenses incurred by the hotel. The Petitioner contended that service charge is not an allowance paid by the employer to the employee. Rather, it is akin to the social custom of "tipping" and, in fact, has been described as a modification or

standardization of such social custom. While a tip is a voluntary payment made by a guest directly to the attendant employee, service charge, when added to the bill, becomes a monthly payment to be made by the guest which is collected by the hotel and then distributed among the employees. The object is to standardize the payment that will otherwise be paid as a tip and to ensure that all employees benefit there from.

From these facts it reveals that in respect of tips being directly paid to the employees, a 10% service charge is being added to the bill amount of the guest and that sum is collected from the guest. The Petitioner's position in this application is that the Petitioner Company and its Group of Companies have adopted a method in order to attract tourists to give credit to the customers to encourage tourism. The Petitioner Company has made arrangements with Tour Operators, and the Tour Operators have made credit facilities to the tourists who are booking through such Operators, and the hotels are not recovering the dues of the guests at the point of departure. The relevant invoices are sent to the relevant Operator who will then collect the sum agreed by the credit arrangements they have with the hotel.

The above arrangement is made by the Petitioner to encourage tourists to book their hotel and to increase their income. The Respondent Union or its members are not party to this agreement or, they have not given their consent for such an arrangement. The Petitioner's position is that, as they have given credit facilities to the Tour Operators, and as such there are large sums of money due from these Tour Operators which are in fact due from the guests who have enjoyed the facilities of the hotel, and as the payment due to the hotel from the guests are not settled, the Petitioner's position is that 10% included in the bill amount is also not settled by the guest. The said 10% service charge was not recovered from the guests and hence the Petitioner is not bound to pay the said service charge to the employees, but the Petitioner continued to pay the said service charge for a substantial period of time. These service charges were in fact not recovered from the guest therefore, the Petitioner took up the position that these

services charges were overpaid to the employees and, therefore, it is justifiable to recover those service charges paid to the employees.

It is common ground that the service charge of 10% is recoverable from the bill amount of the guest, those who are occupying the Petitioner's hotel. The said service charge is a sum earned by the employees of the Petitioner. It is the normal practice in hotel trade that when a guest leaves the hotel, all dues are settled and those sums are recovered by the hotel. In this instant the hotel had made special arrangement that the tours has credit facilities to the guest, and this arrangement was made on the own risk of the Petitioner, and any losses incurred by this arrangement have to be met by the Petitioner alone and not by the employees.

The Arbitrator, in his award, has considered the fact that the service charge that is due to the employees were paid at the relevant time and, after a lapse of several years, without any intimation to the workmen, the Petitioner Company deducted the payment of the service charge on the basis that the credits given to the guests were not settled by the guests. The Arbitrator also observed that the Petitioner has failed to show that this is a common practice in the hotel trade and that the Petitioner had not shown any examples to that effect. In those circumstances the Arbitrator had held that the recovery of service charge already paid to the employees by the Petitioner after a lapse of time is unfair and unjust.

The above finding of the Arbitrator is a finding of fact and there is no legal basis on which the Petitioner could claim that he could recover the said service charges that were paid to the employees. The services charges are actual dues to the employees, and the failure of the Petitioner to recover the same at the time the guests depart from the hotel resulted this situation. As I observed above, the arrangement for credit facilities is made on the absolute discretion of the Petitioner and, therefore, any loss incurred by this arrangement cannot be attributed to the employees of the said hotel. In those

circumstances I hold that the award of the Arbitrator is just and equitable in the given circumstances and, therefore, I dismiss this application without cost.

President of the Court of Appeal