

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 Writ of
Certiorari under Article 140 of the
Constitution.

Lanka Marine Services (Private) Limited,
69, Walls Lane,
Colombo 15.

Petitioner

C.A. Writ Application No: 609/2008

Vs

1. K.M.Sarathchandara,
No. 53/2, Nawala Road,
Nugegoda.

And thirty nine (39) others.

Respondents.

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

COUNSEL : Maithri Wickremasinghe with R. Jayathunga
for the Petitioner
Milinda Gunathilake SSC
for the 4th Respondent.
D.H.Siriwardena
for the 5th to 10th ,12th to 17th 19th ,22nd , 24th to 28th
30th ,35th , 37th to 39th Respondents

Argued on : 31.05.2011

Decided on : 12.12.2011

S.Sriskandarajah J

An Industrial dispute was referred by the Minister of Labour to the 1st Respondent Arbitrator under Section 4(1) of the Industrial Disputes Act. The industrial dispute is as follows:

“Whether the thirty six (36) employees referred to in the attached schedule who were attached to the Lanka Marine Services (Pvt) Ltd while they were serving in the Ceylon Petroleum Corporation and now retired from service of the said company are entitled to receive half months salary for each year of service as service benefit of the Thrift Society that was enjoyed by them in the Corporation and if so entitled what quantum of payment should be granted to each of them as service benefits”.

The Petitioner submitted that the evidence led before the arbitrator revealed that the Petitioner was incorporated on the 1st of March 1993 consequent upon the incorporation of the Petitioner, the bunkering business of the Ceylon Petroleum Corporation (4th Respondent) was transferred to the Petitioner. Along with the transfer of the said business, several employees of the 4th Respondent including the persons named as party of the first part in the arbitration were appointed as employees of the Petitioner with effect from 1st April 1993 by letter addressed to them by the 4th Respondent and by the Petitioner. They were so employed on the same terms and conditions as that enjoyed by them as employees of the 4th Respondent.

The Ceylon Petroleum Corporation Thrift Society Limited was a society incorporated under the Societies Ordinance whose membership was limited to employees of the 4th Respondent. The constitution of the said Society

restricts the membership of the said society to the permanent employees of the Ceylon Petroleum Corporation. A permanent employee of the Petroleum Corporation by an application for membership could join as a member of the Ceylon Petroleum Corporation Thrift Society Limited. The members were required to pay a monthly contribution based on the salary of such member.

The constitution of the said society specifically provides that any member of the said society resigns, retires, discontinued or dismissed from employment in the Ceylon Petroleum Corporation shall ceased to be a member of the Society forthwith. The said Constitution also provides that a member who ceases to be a member is entitled to be paid the balance of his contribution and lump sum contribution and interest thereon after recovery of all dues to the Society.

The Petitioner contended that the persons referred to as party of the first part in the said reference were members of The Ceylon Petroleum Corporation Thrift Society Limited while they were in employment of the 4th Respondent. In terms of the constitution of the Ceylon Petroleum Corporation Thrift Society Limited they ceased to be members of the said society in 1993 on becoming employees of the Petitioner on 1st April 1993.

When they ceased to be members of the Ceylon Petroleum Corporation Thrift Society Limited on 1st April 1993 they received their entitlement from the funds of the Ceylon Petroleum Corporation Thrift Society Limited in terms of the Constitution of the said society.

The 5th to the 39th Respondents admitted that they received the said sum from the Ceylon Petroleum Corporation Thrift Society Limited. These Respondents position was that their memberships were not lapsed and that they expected

the deduction of their monthly contributions to the Thrift Society Ltd from their salaries but it were not done due to the laps of the Petitioner.

It is in evidence that the said Respondents received lump sum contribution from the Ceylon Petroleum Corporation Thrift Society Limited at the time they resume duties with the Petitioners. It is also in evidence and an admitted fact that the said Respondents had not paid their monthly contribution to the Ceylon Petroleum Corporation Thrift Society Limited after they assumed duties in the Petitioner Company. As this is not a statutory payment the Petitioner is not bound to make this payment unless the said Respondents request the Petitioner to make the payment. Even though the said Respondents were aware that the said contributions were not deducted from their salaries by the Petitioner they did not take any steps to pay the said contribution. By their conduct the said Respondents ceased to be members of the said Society.

The arbitrator without taking these facts into consideration has relied on the evidence of an employee of the Ceylon Petroleum Corporation who was absorbed to the Petitioner company and retired on 6th November 2002 was paid a gratuity from the Thrift Society. This witness in his evidence said that the said sum was paid on the basis that he was in continuous employment with the Petroleum Corporation and with the Petitioner until 2002 at the time the Petitioner Company was privatised. On this evidence alone the arbitrator has come to the conclusion that the 36 employees of the party of the 1st part who retired between 01.04.1993 to 31.08.1998 were left out unfairly of their Thrift Society benefits.

The above payment was explained by the Petitioner. The Petitioner company was privatised on 20.08.2002 at that time the Board of the Ceylon Petroleum Corporation determined that employees of the Petitioner who were in

employment at the time of the privatisation would be paid from the 4th Respondent's fund half months wages (after deducting the sum already paid to them from the funds of the Ceylon Petroleum Corporation Thrift Society Limited and their contribution) for each year of service from the date they became employees of the 4th Respondent until the date the shares were transferred consequence upon the privatisation. 90% of the shares of the Petitioner were transferred to John Keels Holdings Limited by share sale and purchase agreement dated 20th August 2002 and 10% of the shares reserved for and transferred to the employees of the Petitioner. The Petitioner contended that the said payments were made for and on behalf of the 4th Respondent on a decision made by the 4th Respondent and not as a payment by the Petitioner.

None of the persons named as party of the first part in the said arbitration were in employment at the time (i.e 20th August 2002) the 4th Respondent made the said decision to make payment to its employees who are serving in the Petitioner Company in lieu of privatisation. The complaint which led to the reference to arbitration was made long after the retirement of all the persons named as party of the first part, they retired between 01.04.1993 to 31.08.1998. But in any event the Petitioner cannot be held liable to make payment to the said party of the first part of the said sum paid to the other employees on a decision made by the 4th Respondent in lieu of privatisation. This sum was not paid consequence of any term or condition in the employment but was made by the 4th Respondent voluntarily to the employees who were in service at the time of privatisation in 2002.

The duty of an arbitrator is to make an award that is just and equitable. Rajaratnam J when explaining the requirements of just and equitable order in *Ceylon Tea Plantations Co.Ltd v Ceylon Estate Staffs' Union SC 211/72 SC minutes 15.05.1974* observed:

“A just and equitable order no doubt is an order that the tribunal is empowered and obliged to make as may appear to the tribunal just and equitable. But it is an order that can be reviewed by this court on the acceptance of the findings of the Tribunal and if this order has been made without any consideration for the employer or the management and the business efficiency of the particular industry. A just and equitable order must be fair by all parties. It never means the safeguarding of the interest of the workmen alone.”

In the given circumstances the award made by the arbitrator is without any basis as this amounts to an error in the face of the record. I quash the said award dated 30th April 2008 published in the Gazette No 1,555/22 dated 26th June 2008. The application of the Petitioner for a writ of certiorari is allowed without costs.

President of the Court of Appeal