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

Deputy Commissioner of Labour

Complainant-Respondent-Petitioner

Vs.

CA(PHC)APN:299/2003
HC Negombo 4/97
MC Wattala 27698

Lanka Milk Food (CWE) Limited
Welisara, Ragama
Accused-Appellant-Respondent

Before : Sisira de Abrew J &
KT Chitrasiri J

Counsel : Vickum de Abrew SSC for the Petitioner.
Nihara Rodrigo PC for the Respondent

Argued on : 1.4.2011

Decided on : 2.6.2011

Sisira de Abrew J.

The Deputy Commissioner of Labour filed an application in the Magistrate's Court (MC) of Wattala to recover a sum of Rs.80, 190/- as the respondent failed to pay the said sum to HD Somadasa. The Commissioner of Labour had decided that the said amount should be paid as gratuity to HD Somadasa who was an employee in the respondent's company. Learned

Magistrate, by his order dated 30.10.96, directed the respondent to pay the said amount. Being aggrieved by the said order of the Magistrate, the respondent appealed to the High Court. The learned High Court Judge (HCJ), by his order dated 17.2.2003, set aside the order of the Magistrate. The petitioner has now filed this petition to revise the said order of the learned HCJ.

The main contention of the learned SSC was that the respondent did not have a right of appeal against the order of the Magistrate and the learned HCJ had no jurisdiction to entertain the appeal filed by the respondent. He cited Martin Vs Wijewardene [1989] 2 SLR 409 in support of his contention. Learned PC appearing for the respondent contended that the respondent could maintain the appeal in the High Court. Learned PC cited the judgment of justice Ranaraja in the case of Cornel Perera and others Vs Commissioner of Labour CA 659/90- decided on 14.7.97. Justice Ranaraja considering the provisions of the Employees Provident Fund Act remarked thus: "The petitioners have, without seeking the remedy by way of appeal available to them as of right, sought revisionary relief, which this court considers misconceived in the circumstances." It is therefore seen from the above judgment that Justice Ranaraja had come to the above conclusion on the basis that the right of appeal was available to a party dissatisfied. In the present case the most important question that must be decided in this case is whether a right of appeal against an order of the Magistrate made under Section 8(1) of the Gratuity act No.12 of 1983 as amended has been created by the said Act. If such right of appeal has not been created by the Gratuity Act, the judgment of Justice Ranaraja has no application to the facts of this case. A perusal of the Gratuity Act reveals that the Act has not created a

right of appeal against an order made under Section 8(1) of the Act. I therefore hold that the judgment of Justice Ranaraja has no application to the facts of this case. If the Gratuity Act has not created a right of appeal, can the learned HCJ entertain an appeal against the order of the Magistrate? The answer to this question is found in the judgment of the Supreme Court in Martin Vs Wijewardene (supra). The Supreme Court in the said case held: "A right of appeal is a statutory right and must be expressly created and granted by the statute. It cannot be implied. Article 138 is only an enabling Article and it confers the jurisdiction to hear and determine appeals to the Court of Appeal. The right to avail of or take advantage of that jurisdiction is governed by the several statutory provisions in various legislative enactments."

Applying the principles laid down in the above judicial decision, I hold that a right of appeal is a statutory right and must be created by the Statute and if a right of appeal has not been created, party affected cannot appeal and the court has no jurisdiction to entertain an appeal.

Learned PC contended that the respondent has a right to come under Section 31 of the Judicature Act which reads as follows.
"Any party aggrieved by any conviction, sentence or order entered or imposed by a Magistrate 's Court may subject to the provisions of any law appeal therefrom to the Court of Appeal in accordance with any law, regulation or rule governing the procedure and manner for so appealing."

In my view Section 31 of the Judicature Act does not create a right of appeal and the aggrieved party has a right to come to the Court of Appeal

by way of appeal only when the statute (in this case Gratuity Act) creates a right of appeal. Further, conviction, sentence and order discussed in Section 31 o0f the Judicature Act is a conviction/sentence/order imposed by the Magistrate after considering the facts of the case. Under Section 8 of the Gratuity Act when the Magistrate makes an order he is only performing a ministerial function and he does not impose a conviction/sentence/order after considering the facts of the case. Undrer Section 8 of the said Act, powers of the Magistrate's court is utilized to collect the sum decided by the Commissioner of Labour. Further it is important to note when the Magistrate makes order under Section 8(1) of the Gratuity Act he does not convict the defaulter and the sum due from the employer is only deemed to be a fine imposed by the Magistrate. This view is supported by the judgment of the Supreme Court in Dayawathi Vs Edirisinghe BALJ 2009 Vol. XV page 258. Justice Thilakawardene in the said judgment considering the Section 38(2) of the Employees Provident Fund Act (EPF Act) which is similar to Section 8(1) of the Gratuity Act remarked thus: "It is important to note that there is no offence committed under Section 38(2) of the EPF Act and the sum due from the employer is only deemed to be a fine imposed by the Magistrate." For these reasons I hold that the order made under Section 8(1) of the Gratuity Act does not fall within the ambit of conviction, sentence or order discussed in Section 31 of the Judicature Act.

For the above reasons I am unable to agree with the submission of the learned PC. I hold that the respondent could not have appealed against the order of the learned Magistrate since the Gratuity Act has not created a right of appeal against an order made by the Magistrate under Section 8 of the Act. Therefore the order of the learned High Court Judge is a nullity.

Learned PC contended that the petitioner could not maintain this application as there is a delay of nine months. I now advert to this question. The most important question that must be decided is whether an order which is a nullity can be permitted to stand due to delay in filing the revision application. In my view no Superior Court will allow an order of a lower court to stand if it is a nullity. This view is supported by the judgment of Justice Somawansa in Leslie Silva Vs Perera [2005] 2 SLR 184. Justice Somawansa at page 190 of the judgment states thus: "In this respect I would say it is settled law and our Courts time and again have held that the revisionary jurisdiction of this Court is wide enough to be exercised to avert any miscarriage of justice irrespective of availability of alternative remedy or inordinate delay."

I have elsewhere of this judgment held that the order of the learned High Court Judge is a nullity. I therefore hold that the petition (application for revision) cannot be dismissed on the ground of delay.

For the above reasons I hold the view that the learned High Court Judge's order should be set aside. I set aside the order of the learned High Court Judge's order dated 17.02.2003 and affirm the order dated 30.10.1996.

Judge of the Court of Appeal

K.T.Chitrasiri J.

I agree

Judge of the Court of Appeal