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

1. D Arjuna Dias
2. P Ramesh Dias

Respondent-Petitioner-Petitioners

Vs

MC Mount Lavinia 25223
HC Colombo HCRA 381/2003
CA (PHC (APN) 183/2003

Assistant Commissioner of Labour

Applicant-Respondent-Respondent

1. Cupid Industries
   No.12 1st Cross Street,
   Kandawala, Road Rathmalana
2. GJ David
   (Liquidator of Cupid Industries)
3. PEA Jayawickrama
   (Liquidator of Cupid Industries)

Respondent- Respondents

Before : Sisira de Abrew J &
Anil Gooneratne J

Counsel : Dulinda Weerasuriya for the petitioners.
M.N.B. Fernando DSG for the
Applicant-Respondent-Respondent
Rajindra Jayasinghe for the 2nd and 3rd Respondents

Argued on : 27.10.2010, 1.11.2010, 2.11.2010 and 3.11.2010

Decided on : 20.1.2011

Sisira de Abrew J.

The respondent-petitioner-petitioners (hereinafter referred to as the petitioners) seek to revise the order (P8) dated 25.7.2003 (which the petitioner claims to be an order) and the order of the learned High Court Judge dated 6.8.2003 (P10)

The petitioners who were directors of a company called Cupid Industries made an application to the Commissioner of Labour to terminate services of its employees under the relevant provisions of the Termination of Employment of Workman Act No 45 of 1971 (hereinafter referred to as the Act). The Commissioner directed to pay a sum of Rs.3,431,880/- as compensation to the employees on or before 30.9.1995. This order of the Commissioner was challenged in a writ application which was dismissed by the Court of Appeal. Special leave to appeal was refused by the Supreme Court. Vide paragraph 6 of the petition. Since the company did not pay the said amount the Commissioner of Labour instituted proceedings in the Magistrates' Court of Mount Lavinia. The learned Magistrate, by his order dated 3.9.99, ordered the company to pay the said amount. The learned Magistrate sentenced each director to a term of one year simple imprisonment in default of the said payment. This order is marked as P2. The learned Magistrate made this order in terms of section 9 of the Act. The revision application challenging the validity of the order was dismissed by the learned High Court Judge (HCJ) by his order (P3) dated 7.1.2002. It has to be stated here that this order was not challenged before any court. Thus the order of the learned Magistrate dated 3.9.99 and the order of the learned HCJ dated 7.1.2002 remain unchallenged. On

27.6.2003 Commissioner of Labour moved summons on the petitioners and they appeared in courts on 25.7.2003. On this day when the Magistrate was going to implement his order dated 3.9.99, learned counsel who appeared for the petitioners moved for time to pay the entire amount stating that the petitioners were accepting the validity of the order dated 3.9.99. Learned counsel on this day further submitted that the petitioners were ready to pay the entire amount. Learned counsel on the same day again moved for two weeks time to pay the amount. The learned Magistrate granted time till 8.8.2003. Vide P8. The petitioners having obtained time to pay the amount, filed a revision application to set aside the order P8 and the learned HCJ, by his order (P10) dated 6.8.2003 dismissed the revision application. The petitioners, by this revision application, seek to set aside P8 and P10. At this stage I have to ask the question: Has the Magistrate made a fresh order on 25.7.2003. The Magistrate has not sentenced the two petitioners on 25.7.2003. When he was reading the order dated 3.9.99, learned counsel moved for time to pay the entire amount which was granted. When the revision application challenging the order dated 3.9.99 (P2) was dismissed by P3, P2 would have been implemented even without an application from the Commissioner of Labour. For these reasons I hold that on 25.7.2003 the learned Magistrate has not made a fresh order. Further I hold that on 25.7.2003 no action or proceedings have proceeded with or commenced against the petitioners.

On 25.7.2003, when the learned Magistrate was getting ready to give effect to his order dated 3.9.99, learned counsel for the petitioners moved for time to pay the entire amount. The said application was allowed.

Learned counsel for the petitioners citing section 264 of the Companies Act contended that no order could have been made by the learned Magistrate on 25.7.2003 without the leave of the District Court as the District Court had made an order for winding up of the company. Section 264 of the Companies Act No.17of 1982 reads as follows:

"When a winding up order has been made or a provisional liquidator has been appointed, no action or proceedings shall be proceeded with or commenced against the company except by the leave of Court, subject to such terms as the Court may impose."

I have earlier held that on 25.7.2003 no action or proceedings have proceeded with or commenced against petitioner. Therefore I am unable to accept the above contention of learned counsel for the petitioners.

Learned counsel next contended that the learned Magistrate in his order dated 3.9.99, has not convicted the company and therefore the petitioners who are the directors of the company could not be held liable to pay the amount ordered by the Commissioner of Labour. Learned counsel by this submission tried to get P2 order (dated 3.9.99) set aside. Bur it has to be stated here that no action was instituted to challenge the order of the learned HCJ dated 7.1.2002 (P3) which affirmed the order dated 3.9.99(P2). Further the petitioners, by this revision application, do not seek to set aside the orders marked P2 and P3. The petitioners, by this revision application, only seek to set aside orders marked P8 and P10. Learned counsel for the petitioners, in his submission replying the learned DSG admitted before us that he would not challenged P2 and P3.

On 25.7.2003 when the learned Magistrate was going to

implement the order dated 3.9.99 (P2), the petitioners accepted the validity of the said order and moved for time to pay the entire amount. Vide P8. The petitioners having accepted the validity of P2 before the learned Magistrate challenged the same in these proceedings. In my view a party which accepts the validity of a judicial order before a Court of Law, cannot later challenge the validity of the same before another Court. In granting relief in a revision application court must examine the conduct of the petitioner. The petitioners, on 25.7.2003, having accepted the validity of the order marked P2 moved for time to pay the amount stated in the said order. The learned Magistrate granted time. But later they, in the High Court, challenged the very order which granted them time. It is therefore seen that the intention of the petitioners on 25.7.2003 was to hoodwink the Magistrate and obtain time to challenge the order allowing their own application. The revision being a discretionary remedy will not be available to a party who displays this kind of conduct. This view is supported by the judicial decision in Perera Vs Peoples Bank BALJ 1995 part 1 page 12 wherein His Lordship GPS de Silva CJ held that: "revision is a discretionary remedy and the conduct of the petitioners is a matter which is intensely relevant for the granting of such relief." For these reasons I hold that a party which attempted to hoodwink a court is not entitled to claim relief under revisionary powers of this court.

It has to be noted that the Commissioner of Labour made the order in 1995. The 1st petitioner by his letter dated 9.4.2002 (vide 1R2) requested the Commissioner of Labour to grant time to pay the amount. The order of the Commissioner was challenged by way of a writ application in this Court. Special leave against the judgment of this Court

was refused by the Supreme Court. Even after lapse of fifteen years the litigation has not come to an end. It is an accepted principle in law that there must be finality in litigation.

For the above reasons, I dismiss the petition of the petitioners with costs.

Petition dismissed.

Judge of the Court of Appeal

Anil Gooneratne J

I agree.

Judge of the Court of appeal.