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

Coca-Cola Beverages Sri Lanka Limited
Tekkawatta,
Biyagama.

PETITIONER

C.A 382/2009 (Writ)

1. D. S. Edirisinghe
Commissioner General of Labour
Labour Secretariat,
Colombo 5.

2. Deputy Commissioner of Labour
Western Region 1
Labour Secretariat
Colombo 5.

3. A. Dissanayake
Assistant Commissioner of Labour
District Labour Office (Colombo Central)
6th Floor, Labour Secretariat,
Colombo 5.

4. J. M. Nimal Jayasinghe
Labour Officer,
District Labour Office (Colombo Central)
6th Floor, Labour Secretariat,
Colombo 5.

5. A. N. W. Perera
Deputy Commissioner of Labour
Legal Division
Labour Secretariat,
Colombo 5.

6. W. R. S. Fernando
240, Temple Road,
Thalapathpitiya,
Nugegoda.

RESPONDNETS

Coca-Cola Beverages Sri Lanka Limited
Tekkawatta,
Biyagama.

PETITIONER

C.A 383/2009 (Writ)

Vs.

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Legal Division
Labour Secretariat,
Colombo 5.

6. M. L. T. Perera
31, Jayasinghe Raod,
Colombo.

RESPONDNETS

BEFORE: Anil Gooneratne J.

COUNSEL: Chandana Prematilleke for Petitioner

M. N. B. Fernando D.S.G., for 1st – 5th Respondents

Rohan Sahabandu for 6th Respondent

ARGUED ON: 06.11.2012

DECIDED ON: 06.03.2013

GOONERATNE J.

The Petitioner is a company which has applied for Writs of Certiorari and Mandamus. The relief sought pertains to the question of payment of gratuity and seeks to quash documents P10, P11, P13b, P15 and to quash documents P19, P19A, P21, P23 & P35 regarding Employees Provident Fund Contributions. A Writ of Mandamus is sought to compel the 1st & 5th Respondents to withdraw the certificates filed under the Gratuity Act and the proceedings in the Magistrate's Court (sub paragraph viii of the relief prayer). All the arguments put forward in this case is on the question whether the monthly allowance paid to the 6th Respondent in a sum of Rs. 8500/- should be considered in the computation of his gratuity. Petitioner's contention was that it is not so and the monthly allowance of Rs. 8500/- was only a perk paid to the 6th Respondent and does not fall within the definition of wage or salaries in terms of the payment of Gratuity Act and the 'earnings' under the Employees Provident Fund Act.

The 6th Respondent by letter P1 of 6.10.2005 complained to the Petitioner, his employer, that the monthly allowance of 8500/- paid to him during his employment should be considered in computation of gratuity and requested the payment of balance gratuity due on same. Petitioner by P2 rejected such request. This resulted in a complaint being lodged with the 3rd Respondent (P3) who inquired into the matter. Thereafter there had been several exchange of letters between the parties and the 1st – 3rd Respondents. Since the Petitioner in

his pleadings and submissions describe very many details, I would incorporate same as far as possible as follows to understand the position of the Petitioner, which deals with facts subsequent to the inquiry held on 12.12.2006.

1. The Petitioner replied to P10 & P11 by its letter dated 22.01.2007 (vide P12) stating that at the inquiry held on 12.12.2006 though the 3rd Respondent took a decision that the Petitioner should pay the 6th Respondent the aforesaid 'balance' in the payment of gratuity, the Petitioner objected to the said decision and the objection was recorded in the proceedings and the 3rd Respondent had promised to send the proceedings along with the order but had failed to do so. The Petitioner requested those proceedings in order to take appropriate steps in regard to the said decision. Consequent to this letter those proceedings (vide P13A & P13B) were delivered to the Petitioner.

2. By its letter dated 31.01.2007 (vide P14) addressed to the 2nd Respondent the Petitioner after stating a brief narration of the facts and the decision of the 3rd Respondent made a request to the 2nd Respondent to review the said illegal, unfair and unreasonable decision.

3. The Petitioner did not receive a reply from the 2nd Respondent but the 3rd Respondent sent a letter dated 13.02.2007 (vide P15) threatening to take legal action against the Petitioner as the time given for the payment of the 'balance' of the gratuity as set out in P10 & P11 had lapsed.

4. The Petitioner in the circumstance wrote to the 1st Respondent on 28.02.2007 (vide P16) referring to P14 & P15 and highlighting the lack of response from the 2nd Respondent and requested him to hold a proper inquiry into the matter and stay any action by the 3rd Respondent until then.

5. Having received no reply the Petitioner sent a reminder to the 1st Respondent on 19.07.2007 (vide P17) referring to P16 and inquired as to what course of action he had taken regarding P16.

6. The 3rd Respondent again wrote to the Petitioner on 16.07.2007 (vide P18) referring to the inquiry, his decision and the appeal made to the 1st Respondent by the Petitioner and stated that with the intervention of the 1st Respondent the 2nd Respondent had held an inquiry and determined that the allowance paid to the 6th Respondent in addition to the salary should be considered as part of the salary as the allowance had not been identified and directed the Petitioner to pay the gratuity amount set out in his previous notice. The 3rd Respondent also sent a notice dated 10.07.2007 (vide P19) along with a sheet containing calculations (vide P19A) of the alleged outstanding of EPF contributions with his letter and directed the Petitioner to pay the same.

7. The Petitioner promptly wrote to the 1st Respondent on 24.07.2007 (vide P20) and Protested that there was never an inquiry held by the 1st and/or the 2nd Respondent as stated by the 3rd Respondent consequent to requests made (P16 & P17) and requested the 1st Respondent take necessary action to review the 3rd Respondent's decision.

8. The 3rd Respondent again wrote expressing regret to the Petitioner on 01.08.2007 (vide P21) referring to his own letter marked P18 and sought to correct his assertion in P18 of an inquiry by the 2nd Respondent with the intervention of the 1st Respondent and substituted that with a statement that the 2nd Respondent having perused the documents under the advise of the 1st Respondent had not rejected the idea that the allowance in issue was not part of his salary and therefore gratuity and EPF contributions should be already communicated to the Petitioner.

Thereafter it appears that final notices (P23) had been sent. Petitioner had kept on protesting (P24) and Petitioner's received P25, where the 1st Respondent calling upon the 2nd Respondent to submit a full report. Another inquiry was held by the 2nd Respondent where the Petitioner submitted several documents inclusive of two decided cases in the hope of obtaining favourable decision. Nevertheless Magistrate's Court proceedings had been instituted (vide P31 with annexures & P32). Finally Petitioner received P35 on 17.11.2008 from 1st & 2nd Respondents which in no uncertain terms reject the Petitioner's position. In short in P35 the 1st & 2nd Respondents take the view inter alia that Petitioner had failed to establish that allowance paid was only a perk to the 6th Respondent and the allowance paid is part and parcel of salary or wages paid to the 6th Respondent.

It is on the basis of an error of law on the face of the record that the case is being urged by the Petitioner. To support that point the Petitioner rely on the argument that the allowance paid to the 6th Respondent was a perk and not a benefit that would attract the provisions of the payment of Gratuity Act and the Employees Provident Fund Act. Petitioner also emphasis that Section 8(1) of the payment of Gratuity Act cannot be resorted to by the official Respondents until and after such inquiry, and certificate P31 was issued by the 5th Respondent during the pendency of the iqnuiry. I will deal with above and the decided cases cited by the Petitioner.

I have also noted the position of the 6th Respondent, where two documents have been submitted along with his objections marked 6R1 & 6R2. I have carefully considered its contents and the material contained therein, tend to diminish the arguments put forward by the Petitioner. I will in my conclusions

gather the important relevant material that need to be emphasized, from the said documents.

I have also noted with much interest the submissions made on behalf of the 1st – 5th Respondents by the learned Deputy Solicitor General both oral and written. Inter alia much emphasis placed on the following points which had been very convincingly stated and conveyed to this court. It reads thus:

(a) As explained in detail earlier, upon the complaint of the employees an inquiry was conducted (vide P13B) and a decision was made that there is a short fall of the gratuity paid to the employees. As specifically stated in P13B, the Rs. 8,500/- monthly allowance paid to the employees though termed a "perk" or a "perquest" was neither a re-imbursement nor an incentive.

(b) The order of the Labour Department is at P10. Upon representations made and appeals submitted , the matter was re-visited many times. Even before the Magistrate Court, upon the request of the employer, the matter was re-considered. P35 is such a communication. By it, the Commissioner General of Labour re-iterates the views expressed in P10, that the Rs. 8,500/- monthly payment is not a perk, but an earning. The sum to be recovered is the stipulated sum stated in P10. There is no change. There is no conflict.

The factual position need to be ascertained before considering the relevant law. The annextures to document P6 annexed marked X4, X5, X6, X7, X8, X9 & X10, (all letters by the Petitioner employer addressed to the 6th Respondent) need to be examined. Let me give the gist of it as follows in respect of remuneration.

X4 – Letter of appointment dated 4.10.1990. Salary and in addition a living allowance of Rs. 1000/- would be 6th Respondents entitlement

X5 - Letter of 24.5.1991. Cost of living allowance increased to Rs. 1650/- (with retrospective effect from 1.9.1991.

X6 - Letter of 17.7.1992. Cost of living allowance remaining unchanged 1650/- .

X7 - Letter of 21.6.1993. Cost of living allowance increased to Rs. 1900/-

X8 - Letter of 19.4.1994. Cost of living allowance increased to 2200/-

X9 - Letter of 1995 salary revised to Rs. 8740/-. Cost of living allowance of Rs. 1,500/-.

X10 - Letter of 7.5.1996 salary 10,581/-. Cost of living allowance of Rs. 1500/-

All the above letters sent by the Petitioner company makes no reference to a perk or that the cost of living allowance was paid as a perk. (during the period 1990 – 1996).

Then again in 2003, by letter marked P3A (X1) of 19.11.2003 gives the details as follows:

Basic - 25,890/-

Allowance – 8500/-

This letter indicates that an allowance is paid. It is not described as a cost of living allowance. Nor does it tend to describe the position taken up by the Petitioner in P2 dated 6.10.2005 which is a reply to P1 where for the first time the Petitioner state that the allowance is not part of the salary. No specific reference that it is a perk paid by way of allowance. The position of it being a perk seems to be introduced subsequently and an afterthought. The best way to have discussed any change of payment method would have been at least referred to it in the letter marked P3A (Whilst the 6th Respondent was in service). Only by way of pleadings of the employer filed in this court and before the Labour Department that the term 'perk' had been introduced. If in fact it was a 'perk' paid as an allowance such payment would not attract the provisions of the Gratuity Act and the Employees Provident Fund Act. Employers position in that the allowance paid was a 'perk' should have been conveyed to the 6th Respondent or others by way of documentary proof, whilst being in employment.

There is hardly any details or description offered by the employer Petitioner as to how the allowance could be considered as a 'perk', or the circumstances on which it was paid. I see no basis to reject the basis conveyed in letter P35 and the matters on which conclusion arrived at in inquiry notes P13B. Does it show any incidental benefit or a casual payment?

This court is also mindful of the contents of 6R1 & 6R2, and especially the submissions of fact and submissions of law in 6R2, throw more light on the issue at hand. Each of those submissions may be relevant but not conclusive to decide the case in hand.

The interpretation of Section 20 of the payment of Gratuity Act No. 12 of 1983 defines wage or salary. It reads thus:

"wages or salary" means –

(a) The basic or consolidated wage or salary;
(b) Cost of living allowance, special living allowance or other similar allowance; and
(c) Piece rates;

Employees Provident Fund Act No. 15 of 1958 as amended defines 'earnings' as follows:

"earnings" means –

(a) Basic wages or salary;
(b) Cost of living allowance, special living allowance and other similar allowances;
(c) Payment in respect of holidays;
(d) The cash value of any cooked or uncooked food provided by the employer to employees in prescribed employments and any such commodity used in the preparation or composition of any food as is so provided, such value being assessed by the employer subject to an appeal to the Commissioner whose decision on such appeal shall be final; and
(e) Such other forms of remuneration as may be prescribed.

The above legislation had been introduced as social legislations and the Intention of the legislature had been to protect the workmen or employee and grant benefits in their retirement. Very many aspects of remuneration had been included in the above definition. But a 'perk' as described by the employer does not fall within the above definitions. The Labour Commissioner had a full inquiry and gave all the possible opportunities to establish the employers point of view, but the Petitioner Company was unsuccessful in their attempts. In all the above facts and above circumstances, this court would not disturb the views and findings of the 1st to 5th Respondents and the several relief prayed for cannot be granted and court does not wish to exercise its discretion in favour of the Petitioner Company. Whatever device or cunning skill employed to get over the difficulty in paying statutory dues on the part of the employer had not been tolerated by the Commissioner of Labour. The so called 'perk' had been inquired into by the 1st – 5th Respondent on several occasions and given adequate opportunities for both parties to establish or destroy such a concept.

I also examined the two cases cited on behalf of the Petitioner. Both those cases have no direct bearing to the case in hand. The case of National Workers' Congress Vs. Madihahewa relate to "price and price share supplement" and "attendance incentives". These two items are not recurring allowances unlike the allowance paid to the 6th Respondent. As such the said case has no application. The other case cited (Henadheera Vs. Commissioner of Labour) refer to a settlement under Section 12 of the Industrial Disputes Act and involves a special allowance paid through a subsidiary. I have also considered the case of X (Employer) Vs. Deputy Commissioner of Labour and Others 1991 (1) SLR 223...

Held:

Showing cause against certificates issued under the Payment of Gratuity Act No. 12 of 1983, S.8(1) is not limited to showing that the petitioner was not the person named as defaulter in the certificate, that he has paid the amount specified in the certificate and that he is not resident within the jurisdiction of the Magistrate's Court but also extends to showing that the sums specified in the certificates are not due or that they have been incorrectly calculated because under S.8(2) of the Act, the Commissioner's certificate is only prima facie evidence. It is open to the petitioner to displace the effect of the prima facie evidence by offering further evidence of an inconsistent or contradictory nature.

The rationale in the above judgment is to permit the Petitioner in that case, is to show cause by leading evidence or otherwise that the amounts reflected in the certificate or any part thereof are not due. That is mainly for the reason that in terms of the payment of Gratuity Act more particularly Section 8(2) enumerates that Commissioner's certificate shall be only prima facie evidence of the amount due and had been duly calculated and that amount is in default. The above judgment is no doubt a persuasive judgment; and the Petitioner cannot be prevented in leading evidence to displace the effect of such evidence by offering further evidence of an inconsistent or a contradictory nature.

The purpose of the writ application filed in this court for Certiorari and Mandamus is to contest the decisions of the Commissioner of Labour on entitlement on gratuity payment and to see that the subsequent proceedings in the Magistrate's Court case are quashed. The purpose is two fold. Before I proceed further I would un hesitantly observe that the dicta in the above decided case would not have any application to recovery of Employees Provident Fund dues (more in point to sub paragraph (vi) of the relief prayer of the petition of the Petitioner on EPF). Therefore taking the argument further, the Employer has not been able to provide material or establish by way of evidence any material to

demolish the point of view or decisions of the 1st to 5th Respondent in presenting a prima facie case, under the payment of Gratuity Act. To that extent there is no conflict or confusion, and to add to it Petitioner has not been successful to prove an error of law on the face of the record, based on the material furnished by the Employer to the Commissioner of Labour. As such this court is of the view that the Petitioner had not made out a case for an issuance of the prerogative writs sought in the manner pleaded and argued. Therefore I dismiss this application.

At this point of the judgment before I comment on the Magistrate's Court procedure under the above statute, I wish to observe that the writ jurisdiction conferred in terms of Article 140 of the Constitution cannot be disturbed by any other section or provision of any other law. Constitutional provisions being the higher norm, it must prevail over any other statutory provision or law.

However the inquiry contemplated under Section 8(1) read along with Section 8(2) of the payment of Gratuity Act is the second stage and gives the Employer another opportunity to place further material only to displace the prima facie effect of evidence and place further material of an inconsistent or contradictory nature and demonstrate to the Magistrate and prove the conclusive nature of the material placed by the employer. To that extent the Petitioner cannot be prevented in placing evidence to overcome the prima facie effect and to demonstrate the conclusive nature of evidence placed by the employer. This court cannot surmise the material that would be forthcoming before the Magistrate since before the Commissioner of Labour the material was not placed by the employer to prove the casual nature of the allowance or its non recurring nature. Nor that the allowance paid by the employer to the employee was a

casual fee or profit in addition to the regular salary which is a benefit incidental to a particular employment, and which could be described as a 'perk'.

In all the above facts and circumstances of this case, subject to the views expressed above, I dismiss this application with costs. (C.A 382/2009) The connected application (C.A 383/2009) is identical and similar to the above C.A 382/2009 application, except on the amount claimed by the 6th Respondent. Therefore I proceed to dismiss both applications with costs.

Both applications dismissed.

JUDGE OF THE COURT OF APPEAL