

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

In the matter of an application for a  
writ of Certiorari.

Korean Spa Accessories (Pvt) Ltd.,  
No.9, Modarawila Industrial Zone,  
Panadura.

**PETITIONER**

C.A. (Writ) Application No.292/2011

Vs.

2. Commissioner General of Labour,  
Labour Secretariat,  
Colombo 5.

3. Gamini Lokuge,  
Minister of Labour and  
Labour Relations,  
Labour Secretariat,  
Colombo 5.

And 02 Others.

**RESPONDENTS**

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

**COUNSEL** : Jeffry Alagaratnam PC with Lasantha Gurusinghe

for the Petitioner,  
Vicum de Abrew SSC  
for the Respondents

**Argued on** : 18.05.2012

**Decided on** : 20.03.2013

**S.Sriskandarajah, J,**

The Petitioner is a company registered in Sri Lanka. The Petitioner submitted that on or about the 6<sup>th</sup> of June 2007, the Petitioner received a notice to appear on 22<sup>nd</sup> of June 2007, in relation to an industrial dispute, before the Arbitrator the 4<sup>th</sup> Respondent. The said dispute was between 101 employees represented by the 1<sup>st</sup> Respondent and Accessory Corporation (Pvt) Limited, and the dispute is in relation to the termination of the employment of these employees by the said Accessory Corporation (Pvt) Limited. The Petitioner, before the Arbitrator, took up the position that it is an independent company and had no relationship to the Accessory Corporation (Pvt) Limited and it had no knowledge of the dispute. The Petitioner had also taken up the position that it had no agreement what so ever with Accessory Corporation (Pvt) Limited in relation to the assets and liabilities of the said Accessory Corporation (Pvt) Limited. It is the position of the Petitioner that the premises of the Accessory Corporation (Pvt) Limited, which was mortgaged to the Commercial Bank, was purchased by the Petitioner after discharging the bond. Other than that there is no agreement between the Petitioner and the Accessory Corporation (Pvt) Limited in relation to the business or employees of Accessory Corporation (Pvt) Limited. The Petitioner took up the position that it had no responsibility in relation to the employees of the Accessory Corporation (Pvt) Limited.

The position taken by the Trade Union, the 1<sup>st</sup> Respondent in the arbitration proceedings was, as the Petitioner was carrying on the same business as that of the Accessory Corporation (Pvt) Limited, the Petitioner should have made provision or entered into agreement with the Accessory Corporation (Pvt) Limited, to deal with the

employees' liabilities. It is the position of the 1<sup>st</sup> Respondent that the Petitioner had not only bought the land and building, but it had also purchased the business of the Accessory Corporation (Pvt) Limited and, therefore, the Petitioner is liable for matters related to employees of the said Accessory Corporation (Pvt) Limited. In these circumstances the 1<sup>st</sup> Respondent's position is that the Petitioner is answerable for the liabilities of the previous management.

Evidence was led before the Arbitrator, the Arbitrator, without analyzing the liabilities of the Petitioner and the Accessory Corporation (Pvt) Limited in relation to the employees of the Accessory Corporation (Pvt) Limited, has stated, that the Accessory Corporation (Pvt) Limited sought to enforce new conditions on the workers by unilaterally reducing the number of workers in any one shift in the moulding section, and the workers had protested this arrangement. The workers' position is that the arrangement was a physically impossible task to achieve. Due to this protest, the company put out a notice closing down the moulding section from the 5<sup>th</sup> of April 2005, and the employees in the moulding section were instructed not to report for work from 6<sup>th</sup> April 2005. The company further published a notice on 21<sup>st</sup> April 2005, informing the workers of the moulding section that those who do not wish to work according to the new arrangement, could leave the services of the company voluntarily and they would be paid all benefits legally due to them. The workers submitted individual letters to the company stating that they were not willing to work according to the new arrangement, but they were prepared to work on the previous arrangement. On 12/05/2005, the Accessory Corporation (Pvt) Limited issued letters of vacation of post to the workers. In the arbitration proceedings the Accessory Corporation (Pvt) Limited did not participate. On the request of the 1<sup>st</sup> Respondent the Petitioner was noticed, and the Petitioner before the Arbitrator took up the position that the Petitioner company did not have any details of the dispute between the workers and the Accessory Corporation (Pvt) Limited. The Petitioner company produced only a transfer deed showing the transfer of the property of the Accessory Corporation (Pvt) Limited to the Petitioner.

The Arbitrator, in his award, observed that the dispute arose due to the Accessory Corporation (Pvt) Limited closing down the said section and the employees were told that they have vacated their posts, and the Arbitrator had considered the fact that the employees do not have the mental element to vacate their posts and the employees' position was that they were prepared to work under the old agreement. The document produced before the Arbitrator does not reveal any agreement between the Petitioner and the Accessory Corporation (Pvt) Limited or any relation to its employees or business. The Arbitrator was of the view that any agreement that has been reached between the Petitioner and the Accessory Corporation (Pvt) Limited should have contained provision for the settlement of disputes that had arisen when the transfer of assets was effected in favour of the Petitioner, and he observed that the Petitioner had taken the business of the previous company and it can be reasonably assumed that the transfer of assets of Accessory Corporation (Pvt) Limited meant not only the transfer of the business, but also the machinery and equipment for which they wanted workmen, and it is the maxim of law that a management cannot by merely transferring their assets get rid of the claims and rights of their workmen. Observing the above, the Arbitrator had come to the conclusion that the Petitioner company had taken over the business and the assets and liabilities of the previous company, i.e., Accessory Corporation (Pvt) Limited and, therefore, becomes liable in law to meet the liabilities of these employees.

The evidence reveals that the Petitioner company had only purchased the building and the machinery and it has not purchased the business of the Accessory Corporation (Pvt) Limited. The Author, R. de Silva, in his "Contract of Employment", published by the Employees Federation of Ceylon, has observed: "Where a business is taken over by another employer, the transferee does not, in the absence of an agreement to the contrary, become the employer of the transferor employees." The above observation of the author shows that, in the absence of an arrangement, even if the business is taken over, it cannot mean that the employees were also taken over along

with the business. In this particular case, there is no evidence to show that the business was taken over by the Petitioner Company. There is positive evidence to show that the Petitioner company had only purchased the property of the Accessory Corporation (Pvt) Limited, and there is no agreement or arrangement to take over the business or employees of the said Accessory Corporation (Pvt) Limited. In those circumstances the Petitioner cannot be held responsible for any liability of the Accessory Corporation (Pvt) Limited in relation to the employees.

The arbitration proceedings had commenced between the Ceylon Mercantile, Industrial and General Workers' Union on one part and the Accessory Corporation (Pvt) Limited on the other part. In those circumstances the Arbitrator has no authority to substitute the Petitioner as a party to the said arbitration proceedings and/or to fix liability on the Petitioner where the Petitioner was not a party to the said proceedings. In *Piyadasa Vs. Bata Shoe Company (1982) 1 SLR page 91, at page 94, Thambiah J.* held: "There does not appear to be any provision in the Industrial Dispute Act for substitution of parties where an industrial dispute is referred to an Arbitrator under section 4(1) of the Act. There, however, provision for any person whose interests are affected by such dispute, to apply to the Arbitrator to be joined as a party (Regulation 27 of the Industrial Disputes Regulation). There is also provision for the Arbitrator, by written notice, to inform every person considered by the Arbitrator is likely to be affected by such dispute of the date, time and place of hearing (Regulation 25(1)(b)). These provisions do not enable an Arbitrator to substitute one party by another in an industrial dispute pending before him.

In view of the above legal position that the Arbitrator's finding that the Petitioner is liable for the payment of salary to 101 employees whose employment was terminated from April 2005 by the Accessory Corporation (Pvt) Limited has no basis. The finding of the Arbitrator, that the new company Korean Spa Accessory Corporation (Pvt) Limited (the Petitioner) had taken over the business and the assets and liabilities of the

previous company, Accessory Corporation (Pvt) Limited, was a finding without any evidence and, therefore, it is an error on the face of the record, and this Court quash the Arbitrator's Award dated 6/12/2010, and allow the Petitioner's Application for a Writ of Certiorari, without cost.

President of the Court of Appeal

Deepali Wijesundera, J

I agree,

Judge of the Court of Appeal