

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

Sri Lanka Telecom PLC  
Lotus Road,  
Colombo 1.

**PETITIONER**

C.A 15/2009 (Writ)

Vs.

1. Hon. Gamini Lokuge  
Minister of Labour Relations and  
Productivity Improvement  
2<sup>nd</sup> Floor, Labour Secretariat,  
Narahenpita, Colombo 5.
2. Commissioner of Labour  
Department of Labour,  
Labour Secretariat, Colombo 5.
3. V. Vimalarajah  
Arbitrator  
B. S. 2/6, Manning Town Flats,  
Colombo 8.
4. M. F. M. Ikram  
No. 285, Akbar Town,  
Wattala.

**RESPONDENTS**

**BEFORE:** Anil Gooneratne J. &  
H. N. J. Perera J.

**COUNSEL:** C. Unamboowa with N. Sirimanne for the Petitioner  
M. Maharroof with Pathum Wickremaratne for 4<sup>th</sup> Respondent  
Uresha Fernando S.C. for 1<sup>st</sup> & 2<sup>nd</sup> Respondents

**ARGUED ON:** 05.02.2013

**DECIDED ON:** 06.05.2013

**GOONERATNE J.**

This is an application by the Petitioner company, Sri Lanka Telecom PLC for a Mandate in the nature of Writ of Certiorari to quash the reference (P11) made by the 1<sup>st</sup> Respondent, Minister of Labour Relations and Foreign Employment, to the 3<sup>rd</sup> Respondent the Arbitrator, in terms of Section 4(1) of the Industrial Disputes Act, and to quash the arbitration award marked P17, as contained in the Government Gazette No. 1576/2 of 17.11.2008 . In the body of the petition it is pleaded that the Petitioner company pursuant to privatization, in collaboration with a Japanese Corporation in 1997, resulted in establishing 'Teleshops'. This is one of the features of the Marketing Division of the Company, and some of the existing staff of the Petitioner company had been recruited to 'teleshops' and accordingly the 4<sup>th</sup> Respondent was assigned limited duties and

functioned as a 'Teleshop Manager' and transferred to the 'Teleshop' of the World Trade Centre. The 4<sup>th</sup> Respondent prior to his transfer as aforesaid was initially appointed to the company as a Computer Programmer which was a non executive grade (letter of appointment produced marked P3a).

The position of those employees transferred to Teleshops as maintained by learned counsel for Petitioner and as pleaded was that such a transfer to a teleshop is not a promotion or an appointment but a transfer which provided opportunities to its employees to work at higher levels to explore the efficiency and suitability of employees and it was done on a trial basis in the manner pleaded in paragraphs 7 – 9 of the petition and the corresponding affidavit filed of record. The letter transferring the 4<sup>th</sup> Respondent as aforesaid is marked P4.

The case of the Petitioner as presented to this court is that the 4<sup>th</sup> Respondent never held an executive posts in the Petitioner company and no letter of appointment issued when he was transferred as Teleshop Manager as aforesaid. It was submitted that transfer by letter P4 as Teleshop Manager does not confer an executive post. The scheme of recruitment is produced marked P5. Petitioner functioned as Teleshop Manager from January 1999 to 2001 (3 years) and was paid the salary of his substantive post as Computer Programmer under salary scale 'B2'. The 4<sup>th</sup> Respondent had never complained to the Petitioner company until December 2001 ((P8) and A13 in the proceeding refer 4 Arbitrator)) regarding non-payment of salary commensurate to the post he held as Manager Teleshop. After 4<sup>th</sup> Respondent resigned from service on or about 14.6.2004 he complained to the 2<sup>nd</sup> Respondent that the Petitioner has failed to pay the salary commensurate to the post from January 1999 to February 2003.

The disputes between the two parties and that referred to Arbitration (also included in beginning of the award P17) reads thus:

“Whether Mr. M.F.M. Ikram, who was in the service of Sri Lanka Telecom Limited, is entitled to receive 2/3 of the salary of the post for which he attended duties in addition to the salary in his substantive post during the period from January 1999 to February 2003 in terms of the Rules and Regulations for Personnel administration of the company and if not, to what relief is he entitled?”

I would refer to the matters urged by the Petitioner before considering the award (P17) of the 3<sup>rd</sup> Respondent. Petitioner emphasis that the 4<sup>th</sup> Respondent applied for the post of Manager of a Teleshop although he did not have the period of 10 years service required for the post and was selected to fill one of the vacancies. He commenced duties at the World Trade Centre on 26.1.1999. As regards the errors of law in the award (P17) the Petitioner takes up the position that the learned Arbitrator exceeded his mandate and went beyond the mandate and had taken into consideration irrelevant matters. The focus on this aspect is on the issues at ‘6’ of P17 and more particularly issue Nos. (i) & (ii). It read as follows:

- (i) Was the workman given an appointment as Teleshop Manager or was he given an assignment on travel basis.
- (ii) Was the workman in Executive grade?

It is the position of the Petitioner that (i) & (ii) are outside the terms of reference and also it is in conflict with the terms of references. Learned counsel for Petitioner argues that the basis of reference is that the workman attended to

the duties of the post of Teleshop Manager, and the matter in dispute is whether the 4<sup>th</sup> Respondent is "entitled to receive 2/3<sup>rd</sup> of the salary of the post for which 4<sup>th</sup> Respondent attended to duties. Inquiry need to proceed on the basis that the 4<sup>th</sup> Respondent attended to the duties only of a Manager of a Teleshop. Learned counsel states that whether the workman was appointed, or assigned to the post, or whether 4<sup>th</sup> Respondent was acting in the post, was outside the scope of reference. This court observes that there is some merit in this argument. If one strictly construe the terms of reference the focus and emphasis is more on receipt or entitlement of 2/3<sup>rd</sup> of salary for the post which 4<sup>th</sup> Respondent attended to duties, and not on the substantive appointment or an acting appointment, as determined in issue No. (1).

It appears to this court that the Arbitrator seems to have misunderstood the basis of establishing teleshops and the initial recruitment procedure/ qualifications, required for the post.

On the issue (ii) whether the 4<sup>th</sup> Respondent was in an executive grade the argument of the Petitioner is that according to the rules and regulations produced by the 4<sup>th</sup> Respondent marked A17 (P6) and pg. 9 of same gives the details of grading of employees. The executive grades are categorized from grade 'A special' to A6 and technical grades from B1 to B4. Petitioners witness in evidence (Soysa) explained the system of grading, which evidence had not been disputed. The 4<sup>th</sup> Respondent was in grade B2 which was a Computer Programmer. Petitioner states that the workman was in Grade B2 and grade not revised. B2 according to A17 is not an Executive Grade.

The Petitioner has also drawn the attention of this court to certain items of evidence, which need to be noted.

A.N.N. de Soysa's evidence (Petitioner witness) in reply to a question by the Arbitrator (pg. 150) was that the 4<sup>th</sup> Respondent was a B2 Grade Computer Programmer. The 4<sup>th</sup> Respondent admit this by letter A12 – pg x/32 “since I joined SLT in July 1993 as a Computer Programmer Class I (B2) my grade was not revised ... neither the salary nor my grade was revised”. As such Arbitrator's findings that the 4<sup>th</sup> Respondent is in an executive grade is not supported by evidence.

The question is not the post held or the so called Executive Grade but whether the workman (4<sup>th</sup> Respondent) would be entitled to additional payment since he was performing the duties of a Teleshop Manager.

There was much emphasis placed by learned counsel for Petitioner on document R7 which oral and documentary evidence was rejected by the learned Arbitrator.

A.N.N. De Soysa produced document R7 the scheme of recruitment for Non-Executives in the Petitioner Company. Witness marked and produced the index of the scheme of recruitment as R7a. At pg. 115 the witness testified that Teleshop Managers are Non-Executives. I would incorporate the following questions and answers to follow the sequence.

Q: Are Teleshop Managers referred to in this Index?

A: Yes

Q: Under what Item?

A: 70, 71, 72, 73 and 74.

Q: These refer to Manager Teleshop Higher grade to Assistant Manage Teleshop grade2?

A: Yes.

Q: So therefore workman's position has right through been a non executive position?

A: yes

Q: Do you have a stipulated approved scheme of promotion applicable to the executive grade?

A: Yes. There is a separate scheme.

One of the main complaints of the Petitioner is the Arbitrator's ruling to reject document marked R7. Petitioner complains that Arbitrator was duty bound to call for the document marked R7 in its entirety if an incomplete document had been tendered. In this regard learned counsel for the Petitioner draws the attention of this court to Section 17(1) of the Industrial Disputes Act. The said section reads thus:

An Arbitrator .... shall make all such inquiries into the dispute as he may consider necessary, hear such evidence as may be tendered by the parties to the dispute and thereafter make such award as may appear to him just and equitable.

This section makes it mandatory for the arbitrator to have considered the evidence placed before him. Accordingly, he should have considered the evidence relating to R7 at pages 114 and 115 quoted above, Had he done so, he would necessarily have had to call for the documents R7 and R7(a) if he found that they had not been filed in the record. His failure to do so is a grave error of law which resulted in his Award not being a just and equitable award.

There is also criticism leveled against the Arbitrator in accepting and relying on document A4 & A6. This court will consider all above to ascertain whether in fact there is an error of law on the face of the record since a court of law should not and cannot change the real nature and structure of any organization as regards policy decisions of the organization. This court also need to consider the method adopted to make payments to 4<sup>th</sup> Respondent.

The learned counsel for 4<sup>th</sup> Respondent on the other hand supported the order of the learned Arbitrator, and submitted that Petitioner's documents were not put in cross-examination and documents were not proved. Learned counsel referred to letter A5 (P4) which is the appointment letter which designate the 4<sup>th</sup> Respondent as Manager. It was one of the contentions of the 4<sup>th</sup> Respondent that documents were not produced. Learned counsel for 4<sup>th</sup> Respondent also contended that some of the documents tendered by the Respondent had not been signed, (R9 – R15 not proved and not signed). It was the position of the 4<sup>th</sup> Respondent that it was not merely a transfer but the 4<sup>th</sup> Respondent was appointed as Manager, which post was a merely created post. Attention of this court was drawn to documents A7 to A 10(a) to indicate as to how the 4<sup>th</sup> Respondent was identified as Manager. To meet the argument of the Petitioner that the 4<sup>th</sup> Respondent lacked the minimum qualification learned counsel referred to in Clause 75(ii) of document A17. It was his position that in terms of the above clause the 4<sup>th</sup> Respondent is entitled to receive 2/3<sup>rd</sup> additional remuneration.

This court observes that Sections 4(1) and 17(1) of the Industrial Disputes Act, gives and lends the Arbitrator certain statutory recognition and powers to make such just and equitable orders. That would not mean that the Arbitrator could go beyond the scope and ambit of the terms of reference for Arbitration and make an order in the manner he pleases. The terms of reference require the Arbitrator to only decide whether the 4<sup>th</sup> Respondent would be entitled to receive 2/3<sup>rd</sup> of the salary of the post for which he attended duties. It was not within the powers of the Arbitrator to decide whether the 4<sup>th</sup> Respondent was in an executive grade (issue ii) and the question of the 4<sup>th</sup> Respondent being



appointed as Teleshop Manager (issue i). Reference to Arbitration only deal with certain monetary gains payable to the 4<sup>th</sup> Respondent. The award indicates that the learned Arbitrator has on a mere reading of letter A5, the Arbitrator concludes that the 4<sup>th</sup> Respondent was given an appointment as Teleshop Manager. In the process the Arbitrator draws further conclusion by certain other material namely documents A7 to A10.

Even if the learned Arbitrator in the process had to consider the question of 'Manager' there is no parallel document or any other document as visiting card, identity and (from the Petitioner Company), extract from telephone directory and newsletters which establish with certainty the post Manager although these documents refer to the 4<sup>th</sup> Respondent as Manager. There is no absolute conclusiveness in the above documents to arrive at a conclusion as thus arrived by the learned Arbitrator. If at all the above said documents would be a mere notification to the public and nothing more. The learned Arbitrators emphasis in the award by referring to A7 to A10 ruling that 4<sup>th</sup> Respondent is a Manager in Executive Grade is a grave error of law, on the face of the record, since it was beyond his scope to come to such a finding and grant pecuniary benefits. On this aspect we are in agreement with the submissions of the Petitioner that where the Petitioner inter alia submitted that workman was in an acting post or assigned to the post or appointed to the post are acts are outside the scope of Arbitration, and the submissions which relate to the question that the 4<sup>th</sup> Respondent never held an executive post based on evidence. In arriving at this finding we gather support from the following authorities.

Ceylon Tea Plantation Co. Ltd. Vs. Ceylon Estate Staff Union SC 211/72 S.C minutes 15.5.1974 .

A just and equitable order must be fair by all the parties. It never means the safe guarding of the interest of the workmen alone.

Again in the case of Municipal Council Colombo Vs. Munasinghe 71 NLR pg. 223 at 225 per H.N.G. Fernando J.

“I hold that when the Industrial Disputes Act confers on an Arbitrator the discretion to make an award which is ‘just and equitable’, the Legislature did not intend to confer on an Arbitrator the freedom of a wild-horse. An award must be ‘just and equitable’ as between the parties to a dispute; and the fact that one party might have encountered ‘hard times’ because of personal circumstances for which the other party is in no way responsible is not a ground on which justice or equity requires the other party to make undue concessions. In addition, it is time that this Court should correct what seems to be a prevalent misconception. The mandate which the Arbitrator in an industrial dispute holds under the law require him to make an award which is just and equitable, and not necessarily an award which favour an employee. An Arbitrator holds no licence from the Legislature to make any such award as he may please, for nothing is just and equitable which is decided by him or caprice or by the toss of a double-headed coin.”

Walkers and sons Vs. Fry 68 NLR 73 at 99 His Lordship the Chief Justice H.N.G. Fernando, SPJ as he then was observed:

“In requiring “just and equitable” orders to be made by Labour Tribunals, does not allow to such a Tribunal or the Arbitrator the freedom of the ‘wild-ass’ in making its orders”

The other important issue highlighted by the Petitioner is the rejection of document R7 by the learned Arbitrator. The award P17 suggest that the document R7 tendered to the learned Arbitrator is an incomplete document. In paragraph 3 of the Award the Arbitrator gives certain reasons to shut out document R7 & R7(a).

It is evident from the Arbitration proceedings that the Petitioners witness had been cross examined on document R7, and entirety of R7 was available for cross examination. In evidence it has transpired regarding the scheme of recruitment and promotion for the non-executive grade category. 4<sup>th</sup> Respondent by his own evidence admitted that he is in grade B2 (according to A17) which is a Technical Grade and not an Executive Grade. Witness of the Petitioner Company testified that front page of R7 states scheme of recruitment and promotion for Non-Executive grades. The cover page shows the title very clearly.

There is a duty cast in terms of Section 17A of the Industrial Disputes Act to make all such inquiries and pronounce a just and equitable order. Duty is on the Arbitrator in terms of the statute and call for all necessary documents and satisfy himself. He cannot reject a document placed by way of evidence which was used in cross-examination or in examination in chief, when evidence had transpired on the contents of documents. This is another grave error. In *State Bank of India Vs. Edirisinghe* 1987 (1) SLR 395 at 420,

Where the arbitrator had made an award acting on the contents of one document alone, ignoring other documents which explained the application of the earlier mentioned document and which represented the general policy of the Bank for the revision of salaries of its nationals, the Court quashed the award for revision of salary on the basis that it was not within the purview of the arbitrator to reject the said general policy. Similarly, in the instant case, it is submitted that it is not within the purview of the 3<sup>rd</sup> respondent to shut out R7 and R7(a) and thereby reject the policy of the petitioner company in respect of the promotion and recruitment of non-executives.

We have also noted the items of evidence which was not subject to any change or verification on the receipt of salary of the 4<sup>th</sup> Respondent. The

witness for the Petitioner Company M/s. Soysa categorically stated that Teleshop Manager in which the 4<sup>th</sup> Respondent attended to duties is not an Executive post. This witness stated that the Applicant was paid 20% of his basic salary as an allowance for performing his duties of teleshop Manager. Witness also stated that the 4<sup>th</sup> Respondent and other Non-Executive in Teleshop were also paid over-time payments for additional work. Even the 4<sup>th</sup> Respondent in his evidence accepted the position that he was paid over time and 20% of his basic salary. The learned Arbitrator does not seem to have considered the oral testimony of the above witness, who had not been contradicted on material points, supported by the 4<sup>th</sup> Respondent's own oral testimony.

The learned Arbitrator has based his award on payments reflected in document A17 (Manual of Rules & Regulations for Personal Administrator of Sri Lanka Telecom Ltd). Reference is made in the award to Clause 7 more particular 7(b) (i) and 7(b) (ii)

The above reads thus:

7(b) Acting appointments in executive positions

- (i) An employee will be appointed to act in a post which is vacant, if a qualified and suitable person is not available to fill the vacancy created. He will be paid 1/4<sup>th</sup> of the initial salary of the acting post in addition to his salary in substantive post. Such appointment should be approved by the CEO or CAQ.
- (ii) If the employee who is to be appointed to act in a superior post does not have the minimum qualification stipulated to the acting post he should be appointed to "attend to the duties" of the post. He will be

paid 2/3 of the additional remuneration he will receive had he been appointed to act in the post. Such appointment should be approved by the CEO or CAO.

It is very clear that the above applies to acting appointments in executive posts. This Clause cannot have any application at all. Teleshop Manager is not an Executive post. Further, if it is arguable that the 4<sup>th</sup> Respondent was attending to duties in a Superior post a careful reading of 7(b) (ii) above he could only be paid 2/3<sup>rd</sup> of ¼ of the initial salary. Never can he be paid 2/3<sup>rd</sup> of the salary of the post in which he was attending to duties.

It is evident that the learned Arbitrator has gone beyond the terms of reference. He has failed to confine its adjudication to the points of dispute referred to him. The learned Arbitrator has misconstrued documents and his award need to be quashed. The rules and regulations made available suggest that any appointment to a substantive post in an acting capacity or in case of attending to duties have to be approved by the Chief Executive Officer of the Petitioner Company. The award has not considered the 20% additional payment which was paid to the 4<sup>th</sup> Respondent along with overtime payments. The 4<sup>th</sup> Respondent also lacked the required 10 years experience. As such the Petitioner Company provided an opportunity to excel in his (4<sup>th</sup> Respondent) position on a trial basis. It was on that footing that employees in the Company were absorbed as Teleshop Managers. The award of the 3<sup>rd</sup> Respondent cannot be considered a just and equitable order and it cannot be an award that merely favours the employee disregarding and misunderstanding the prevalent rules and regulations of the company. We are not inclined to affirm the award (P17). As such having

considered all the facts and circumstances, we allow this application and direct the issuance of the Writ of Certiorari in terms of sub paragraph © of the prayer to the petition without costs.

Application allowed.

JUDGE OF THE COURT OF APPEAL

H. N. J. Perera J.

I agree.

~~JUDGE OF THE COURT OF APPEAL~~