IN THE COURT OF APPEAL OF THE DEMOCRATIC

SOCIALIST REPUBLIC OF SRI LANKA

In the matter of an application for Mandates in the nature of Writ of Certiorari and Writ of Mandamus under and in terms of Article 140 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

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1. Priyantha Serasundara
   111/B8,Lakshapathiya Road,
   Lakshapathiya,
   Moratuwa .
   and 453 others.

PETITIONERS

C.A. (Writ) Application No.284/10

Vs

1. Commissioner General of Labour
   Labour Secretariat,
   Colombo 05.
2. Athauda Seneviratne,
   Minister of Labour Relations and Foreign Employment,
   Labour Secretariat,
   Colombo.

3. Maliban Biscuit Manufactories ltd.
   No. 839, Galle Road,
   Ratmalana.
4. Dr. Irvin Jayasuriya
   Arbitrator,
   Labour Secretariat,
   Colombo 05.

RESPONDENTS

BEFORE : Deepali Wijesundera J.

COUNSEL J.C. Waliamuna with Shantha Jayawardene for the Respondents.
Nayomi Kahawita S.S.C. for the 1st and 2nd Respondents.

Uditha Egalahewa PC with Gihan Galabadage for the 3rd respondent.

ARGUED ON : 15th October, 2014

DECIDED ON : 19th December, 2014

Deepali Wijesundera J.

Four hundred and fifty four petitioners have filed this application seeking a writ of certiorari to quash the Award marked **P4** made by the Arbitrator the 4th respondent. The 2nd respondent has referred the

dispute between the 3rd respondent company and the petitioners under *Section 4(1) of the Industrial Disputes Act* to the 4th respondent for settlement. After inquiry the 4th respondent by his award dated 16/02/2010 has held that the services of the petitioners have not been terminated by the 3rd respondent and that the petitioners have vacated their own posts and that they are not entitled to any relief and no award was made in their favour.

The learned counsel for the petitioners stated that the 3rd respondent who is a leading biscuit manufacturer in Sri Lanka had refused to pay the 3rd bonus by the end of the 2004/2005 financial year to the petitioners as agreed by the Memorandum of settlement entered between the petitioners and the 3rd respondent marked **A1** under Section 12(1) of the Industrial Disputes Act. The petitioners have commenced a protest against this and have also complained to the Commissioner of Labour. The petitioners stated that posters critical of two officers of the 3rd respondent erupted in the premises of the 3rd respondent and on 13/07/2005 the management of the 3rd respondent closed the factory stating that twenty one employees who were interdicted threatened and intimidated the said officers of the 3rd respondent. The workers have continued to protest inside the premises and were removed by the police and they have been refused entry to the said premises. The petitioners stated thereafter they were sent

letters dated 30/07/2005 **(A16)** addressed to each of them to resume work on the 05/08/2005. Thereafter by letters dated 08/05/2005 **(A21)** have informed them that their names have been deleted from the Employees Register of the 3rd respondent. Consequently the 2nd respondent Minister has referred this dispute for settlement by Arbitration to the 4th respondent.

The counsel for the petitioners submitted that the petitioners were on a legal strike and hence vacation of post does not arise. Citing the judgments in **Rubberite Co. Vs Labour Officer, Negombo 1990 2 SLR 42 and Ceylon Mercantile Union Vs Ceylon Cold Stores Ltd and another 1995 1 SLR 261** stated that a strike could be resorted to improve their wages or conditions or give vent to a grievance and not against an employee. He further stated that the demands made by the workers in this application were *bona fide* and thus it is a lawful strike and that the 4th respondent erred in law in holding that the workers vacated their posts by engaging in the strike. He submitted that when workmen are on strike the question of vacation of post does not arise.

The petitioners' counsel stated that the two elements in the concept of vacation of post which is mental and physical has to be established before it is decided there is a vacation of post and cited the

judgment in **Nelson De Silva Vs Sri Lanka State Engineering Corporation 1996 2 SLR 342.**

The petitioners stated that the reference by the 2nd respondent to the 4th respondent was to determine whether the termination of the services were justified or not and that the 4th respondent exceeded the mandate given by deciding the services of the workmen have not been terminated by the 3rd respondent but the employees themselves have vacated their posts. He stated that the Arbitrator derives jurisdiction from the reference and any deviation from the reference is considered to be *ultra vires.*

The learned Deputy Solicitor General for the respondents submitted that the alleged grounds that the Arbitrator has exceeded the powers vested in him under the Industrial Disputes Act by coming to a wrong decision on the facts and the law which can not be set aside in a writ application and should be taken up in an appeal.

The counsel for the respondents submitted that at the inquiry before the 4th respondent the 3rd respondent stated that the petitioners were asked to report to work before a certain date if not they will be

considered as not interested in their jobs but still they did not return to work. He further submitted that the petitioners in their petition has specifically stated that they did not vacate their posts but the 3rd respondent terminated their services on disciplinary grounds which shows that the 4th respondent had to decide whether they have vacated their posts or their services were terminated by the 3rd respondent. Citing the judgment in **Jayaweera Vs Commissioner of Agrarian Services 1996 2 SLR 70** stated if the petitioners were of the view that the 4th respondent had no power to inquire into the question of vacation of post they should have objected to that matter being considered at that point, without doing so they can not now plead the 4th respondent acted in excess of jurisdiction.

The counsel for the respondents submitted the main issue for the 4th respondent to decide was on the evidence placed before him, was whether there was a vacation of post or not therefore the petitioners can not say the 4th respondent's decision is illegal.

The petitioners who kept away from work were sent letters to their houses to report back to work on the 5th of August 2005, but they have kept away from work and the 3rd respondent company has sent the vacation of post letters on the 8th of August three days after the date

they were asked to resume work. The petitioners' counsel mentioned about the concept of vacation of post which is the mental element and the physical element failed he said as the petitioners did not intend to keep away from work therefore the mental element fails. Petitioners even after the 3rd respondent sent letters to resume work did not respond which show they did not want to report back to work. Therefore the petitioners can not say there was no mental element.

The petitioners argument was that the 2nd respondent's reference to the 4th respondent was to see the termination of services was justified or not and not to decide whether there has been a termination. To go into this he had to see what led to the termination, by doing so he had come to the conclusion that there was no termination but the petitioners have kept away without resuming work when asked to report, thereby they have vacated their posts. This is not *ultra vires* the 4th respondent has acted within the reference given to him by the Minister. One can not say the 4th respondent exceeded his powers.

Petitioners at the inquiry have not objected to the 4th respondent taking up the issue of termination of work therefore they now can not say the 4th respondent acted in excess of jurisdiction.

For the afore stated reasons this court is of the view that the petitioners application for writ can not be granted. The petition is dismissed without costs.

JUDGE OF THE COURT OF APPEAL