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* under and in terms of Article 140 of the Constitution of Sri Lanka

Stassen Exports Private Limited,
No.833, Sirimavo Bandaranaike Mw,
P.O. 1970,
Colombo 14.

PETITIONER

CA/157/2014

Vs,

1. Mr. M.M.I.R.A.Jayathilaka,
   Assistant Commossioner of Labour,
   Colombo North,
   Office of the Assistant Commissioner of Labour of Colombo North,
   4th Floor, Deparment of Labour,
   Narahenpita,
   Colombo 05.

2. The Commissioner General of Labour,
   Labour Secretariat,
   Kirula Rd,
   Narahenpita,
   Colombo 05.

3. Mr. W.J. Moses,
   57/14A, 8th Lane,
   Jayaweera Mw,
   Ethul Kotte,
   Kotte.

4. Deputy Commissioner Labour,
   Legal Activities,
   Department of Labour,
   Colombo 05.

RESPONDENTS

Before : **Vijith K. Malalgoda PC J (P/CA) &**

H.C.J. Madawala J

Counsel :Upul Kumarapperuma for the petitioner

Priyantha Nawana DSG for the 1st ,2nd , 4th Respondents

S. Liyanage for the 3rd Respondent

Argued On: 18.06.2015, 14.07.2015

Ordered On: 11.09.2015

Order

Vijith K. Malalgoda PC J (P/CA)

Petitioner to this application Stassen Exports Private Limited has come before this court against an order made by the 1st and / or 2nd Respondents, directing the petitioner to deposit sum of Rs.784 320. 00 as gratuity payment due to one W.J.Moses (3rd Respondent) and penalty, under section 8(1) of the Payment of Gratuity Act No.12 of 1983 (as amended by Act No. 41 of 1990 and 62 of 1992)

The Petitioner has prayed inter alia;

b. Grant and issue a mandate in the nature of a Writ of *Certiorari,* quashing the afore said notification of the 1st Respondent dated 19.11.2012 in P-11
c. Grant and issue a mandate in the nature of a Writ of *Certiorari,* quashing the certificate issued by the 4th Respondent in terms of section 8(1) of the Payment of Gratuity Act No.12 of 1983 as amended by Act No. 41 of 1990 and 62 of 1992 embodied in P-24

According to the Petitioner, the 3rd Respondent was appointed a wharf clerk on 01st May 1980 and was promoted to the post of Junior Executive in April 1984. In April 1993 he was promoted to the post of Senior Executive and thereafter promoted as Assistant Manager- wharf with effect from 1st July 2003. 3rd Respondent had reached his retiring age i.e 55 years in April 2009 and on his request the Petitioner extended his services, after promoting him to the post of Manager-Import Logistics.

Petitioner had further submitted that, whist the 3rd Respondent was functioning as the Manager-Import logistics, it was revealed upon an Investigation done by the Internal Audit that the 3rd Respondent is

responsible for defrauding a large sum of money to the Petitioner Company. Upon the said revelation, the Petitioner had decided to hold a preliminary investigation against the 3rd Respondent.

At that stage the 3rd Respondent had tendered his resignation from the service with effect from the 3rd April 2012 (P-3) but the Chairman of the Petitioner by letter dated 3rd April 2012 informed the 3rd Respondent that his letter of resignation could not be accepted for the reason that he was essential for the investigation that has been commenced against him. (P-4)

However the 3rd Respondent by letter dated 30th April (P-5) informed the Petitioner Company his decision, not to continue with his services from 02nd May 2012 and by letter dated 26th June requested the Chairman of the Petitioner Company to make arrangements to pay his gratuity money. (P-6)

According to the Petitioner, by P-7 Petitioner has refused the said request since the said investigation has not been concluded.

However the 1st Respondent by document marked P-8 which was submitted to him along with P-9, a copy of complaint, said to have made by the 3rd Respondent informed the petitioner to be present for an inquiry which was scheduled to be held on 28th August 2012.

Petitioner participated the said inquiry on 28th August 2012 through his representative and informed the 1st respondent that a preliminary investigation is in progress with regard to the misconduct and misappropriation of funds belonging to the petitioner company and requested the 1st Respondent to stay the proceedings until the preliminary investigations are concluded.

According to the petitioner, after conclusion of the preliminary investigation, on 19th September 2012 a charge sheet was issued on the 3rd Respondent containing 13 charges and requested the 3rd Respondent to show cause within 7 days to the said charge sheet.

However the 3rd Respondent did not take part at the said disciplinary inquiry and failed and /or neglect to submit his show cause.

The said inquiry was re-scheduled for several days with notice to the 3rd Respondent and finally informed the 3rd Respondent that the inquiry would be proceeded exparte by P-20 and the said inquiry was concluded or 19th May 2014.

According to the findings of the said inquiry which was produced marks P-22, the inquirer has found the 3rd Respondent guilty of charges 1,2,3,4,5,6,7,9 and 13.

The position taken up by the petitioner before this court was that, on 28th August 2012, the petitioner took part at the inquiry held before the 1st Respondent on which day, he was permitted by the 1st respondent to proceed with the domestic inquiry and inform the progress to the 1st Respondent, and since then he did not receive any communication except P-11 which I will be dealing later. However the petitioner received summons directing him to appear before the Chief Magistrate Colombo on 29th May 2014 in case No D2485/05 for the alleged offence of defaulting the payment of gratuity of Rs.784370.00 to the 3rd Respondent.

Based on the above facts the Petitioners argument before this court was twofold, firstly the 1st and /or 2nd and/or 4th Respondent failed to give an opportunity to the petitioner to explain his position and/ or to place his case before the inquiry and secondly the 1st and/or 2nd and/or 4th Respondent failed to give reason for their findings as evinced in the documents produced marked P-11 and P-24.

1st, 2nd and 4th Respondents as well as the 3rd Respondent had challenged the Petitioner version with regard to the employment of the 3rd Respondent with the Petitioner Company.

In addition to the above, the 1st, 2nd and 4th Respondents, challenged the Petitioners version with regard to the Inquiry conducted by the 1st Respondent and submitted that the 3rd Respondent by letter dated 13/07/2012 complained the 2nd Respondent of none payment of EPF dues and gratuity by the petitioner. On receipt of the said complaint the 1st Respondent requested both parties to be present for an inquiry on 28.08.2012 at 1.30 pm (P-8, P-9)

On 28.08.2012 only the complainant (3rd Respondent) was present for the inquiry but the employer (petitioner) was absent and unrepresented. The inquiry was re-fixed for 11/ 09/2012 at 10.00 am. (1R6)

On 11.09.2012 the employer (Petitioner) was represented by its legal officer at the inquiry. The said legal officer who represented the Petitioner Company had informed the inquiry officer, that the Management of the Petitioner Company had decided to launch an investigation against the applicant (3rd Respondent) on allegations of cheating and therefore requested the 1st Respondent to suspend the inquiry.

However in response to the above request, the 3rd Respondent submitted before the inquiry that until his resignation from the Petitioner Company, no such allegation was made and therefore requested the 1st Respondent to calculate his dues.

Considering the submissions made by both parties, the 1st Respondent had decided to adjourn the proceedings for two weeks and the Petitioner was ordered (employer) to inform the progress of the

inquiry he referred to, against the 3rd Respondent (complainant) in writing on the next day. It was further informed by the 1st respondent that if the petitioner failed to comply with the said directive, steps will be taken to calculate and recover the dues to the 3rd Respondent. The said inquiry was then adjourned for 26.09.2012.

According to the proceedings before the 1st Respondent, which was produced marked 1R6, when the inquiry was again taken up on 26.09.2012, the Legal Officer who represented the Petitioner Company had informed the 1st Respondent that the management had already sent out a charge sheet against the 3rd Respondent, and in view of the said disciplinary inquiry the Petitioner cannot make any gratuity payment to the 3rd Respondent. At that stage the 3rd Respondent too had made submission objecting to the above request and supporting his contention as to why 1st Respondent should act under the provisions of the Payment of Gratuity Act No. 12 of 1983.

Based on the submission made before the inquiry officer, the decision of the 1st Respondent was communicated to the petitioner by P-11.

However the petitioner's position before this court was that, after receiving P-11 the Petitioner Company had protested to the decision of the 1st Respondent and the said protest was communicated to the 1st Respondent by P-12.

However, interestingly, the petitioner has not received any communication thereafter from the 1st and/or 2nd and/or 4th respondent until the receipt of P-24.

The position taken up by the respondent before this court was that, after receiving P-12 the 1st Respondent by letter dated 15.12.2012 summoned the Petitioner for an inquiry on 02.01.2013.(1R4-A) The said letter too was sent to the same address as referred to in P-11. Since the Petitioner did not turn up for the said inquiry, another notice was sent on 02.01.2013 informing the Petitioner to be present for an inquiry on 16.01.2013 (1R4-B), but the Petitioner did not turn up for the inquiry even on that day.

Since the petitioner did not turn up twice the 1st Respondent decided to enforce his decision dated 19.11.2012 through courts. (1R5)

Based on the material placed before this court and the submissions made, I see no merit in the 1st argument of the Petitioner, to the effect that the Respondents have not given the Petitioner an opportunity to place his case before the 1st Respondent. After receiving P-12 an appeal from the Petitioner the 1st Respondent on two occasions noticed the Petitioner for an inquiry. The said notices were dispatched to the same address given in P-11 and P-24. If the Petitioner had received P-11 and

P-24 this court is reluctant to agree with the petitioner, that he did not receive any other document in between. If the Petitioner has not made any attempt to make use of the opportunity given to him to explain his position, it is not wrong for this court to conclude that there is no merit in the Petitioners' first Argument.

The principles of natural justice do not as yet, include any general rule that reasons should be given for decisions.

However the importance of giving reasons irrespective of the fact that there is no express or implied obligation to do so had been clearly shown in many judicial decisions.

As Wade says "Nevertheless there is strong case to be made for the giving of reasons as an essential element of administrative Justice. The need for it has been sharply exposed by the expanding law of judicial review, now that so many decisions are liable to be quashed or appealed against on grounds of improper purpose irrelevant considerations, and errors of law of various kinds. Unless the citizen can discover the reasoning behind the decision, he may be unable to tell whether it is reviewable or not, and so he may be deprived of the protection of the law". (H.W.R.Wade and C.F.Forsyth Administrative law 10th Edition page 436).

The house of Lords too has considered the legal position as regards giving of reasons. In ***R V Secretary of State for the Home Department, ex parte Doody (1994) 1 AC 531*** the Court dealt with a life sentence term of a prisoner. The Secretary of State had not given reasons for the sentence which had been imposed. The Court held that although the law does not recognize a general duty to give reasons for an administrative decision, such a duty can be implied in appropriate circumstances. The prisoner could challenge the sentence only if it could be shown to be based on flawed reasoning.

The necessity to give reasons was also considered by our courts in a number of instances.

Happuarachchi and others vs. Commissions of Elections and others, Karunadasa vs. Unique Gem Stones, Surangai Marapone vs. The Bank of Ceylon are few such decisions.

In the case of ***Kurunadasa vs. Unique Gem Stones (1997) (1) SLR 256,*** Mark Fernando (J) has observed the need to give reason as follows.

"To say that Natural Justice entitles a party to a hearing does not mean merely that his evidence and submission must be heard and recorded, it necessarily means that he is entitled to a reasoned

consideration of the case which he presents. And whether or not the parties are also entitled to be told the reasons for the decision, if they are with held, once judicial review commenced...."

In the case of **Kurunadasa vs. Unique Gem Stones**, Supreme Court further concluded that "But that does not end the matter. The legal position was not clearly appreciated, and the parties do not seem to have realized the need to invite the Court of Appeal to call for and examine the record and the recommendation. In the course of the hearing in this Court, Mr. Kamalasabayson tendered the copies of the recommendation made by the 3rd Respondent and undertook to make the 2nd Respondent's file available whenever required. The 1st Respondent consented, in the interest of justice, to the case being re- heard by the Court of Appeal, after calling for and examining the record and the recommendation."

However the above decision was not followed in Happuarachchi and Other vs. Commission of Election and another by Supreme Court and ordered the respondents to re-consider the application submitted by the Petitioners and to give reason for his decision following such re- consideration.

When considering the circumstances of this case, we have the advantage of going through the inquiry proceeding submitted before this court by the respondent, where the 1st Respondent had considered the circumstances under which the services of the 3rd Respondent were terminated.

As pointed out by the Counsel for the 3rd Respondent, the service extension offered by the Petitioner Company with a promotion to the 3rd Respondent was not given to him on his request as submitted by the petitioner but as evident by 3 RI the 3rd Respondent had submitted retirement papers when he completed 55 years. At that stage instead of permitting him to retire from the service he was given a promotion by document 2E. However, when the 3rd Respondent reached the age of 58, he submitted resignation papers specially due to medical reasons. The 3rd Respondent took up the position that until he submitted resignation papers on 3rd April 2012, he was not informed of any investigation pending against him. The 3rd Respondent had resigned from his service with effect from 2nd May 2012 after sending a resignation dated 30th April, but the petitioner has failed to satisfy the 1st Respondent (as well as this court) of any steps the petitioner has taken to investigate the 3rd Respondent between 3rd April to 2nd May other there the document produced marked P-4.

All the documents referred to above were before the 1st Respondent when he made order as evinced in document P-11. As pointed out by me earlier, the reasons given by the 1st Respondent is before this court produced on behalf of the Respondents, and the court observes that the 1st Respondent had given sufficient reasons to reject the request made by the Petitioner and to hold that the petitioner is liable to

pay gratuity to the 3rd Respondent under the provisions of the Payment of Gratuity Act No 12 of 1983 (as amended)

I therefore conclude that the 1st and/or 2nd and/or 4th Respondent have come to a correct conclusion having given reasons and giving reasonable opportunity to the petitioner and in the said circumstance there are no grounds on which the reliefs as prayed for by the Petition could be granted

Accordingly I dismiss the Petitioner's Application with cost fixed at Rs. 50 000/-

PRESIDENT OF THE COURT OF APPEAL

H.C.J. MADAWALA,

I agree,

JUDGE OF THE CUORT OF APPEAL

Application is dismissed with cost.