

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

**In the matter of an Application for a mandate in the
nature of *Writ of Certiorari* under article 140 of the
Constitution of the Democratic Socialist Republic of
Sri Lanka**

The Finance and Guarantee Ltd,
Greenlanka Towers,
2nd Floor, No. 46/46, Nawam Mw,
Colombo 02.

(Now known and called as UB Finance
Company Ltd, of No.10, Daisy Villa Avenue,
Colombo 04)

PETITIONER

CA/WRIT/377/2013

Vs,

1. Assistant Commissioner of Labour,
Colombo South,
District Labour Office,
Labour Department,
Colombo 05.
2. The Commissioner of Labour,
Labour Secetariat,
Narahenpita,
Colombo 05.
3. U.G.P.K. Darmasiri,
No. 137/7, Ehalape Road,
Katuwawala,
Boralesgamuwa.

RESPONDENTS

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

Counsel: Indra Ladduwahetti for the Petitioner

Anusha Samaranayake SSC with N. Kahawita SC for the 1st and 2nd Respondents

N.R. Sivendran for the 3rd Respondent

Argument on: 12.10.2015

Written Submission On: 13.11.2015

Order on: 19.02.2016

Order

Vijith K. Malalgoda PC J

Petitioner to the present application, the Finance and Guarantee Ltd which is presently known and called as UB Finance Company is a limited liability company incorporated under the Companies Act.

The said Petitioner has come before this court seeking inter alia,

- b). grant a mandate in the nature of *Writ of Certiorari* quashing the decision of the 1st Respondent contained in P-8.

Petitioner has named a Former Director of the said Company as the 3rd Respondent, on whose complaint the 1st Respondent conducted an inquiry and made the impugned order dated 11.07.2013 directing the Petitioner to deposit sum of Rupees 1,748, 000.00 with the 1st Respondent.

At the commencement of the Argument, it was brought to the notice of court of a similar application numbering CA/Writ/ 413/2013 which is also fixed for today, by the counsel for the Petitioner and the Learned Senior State Counsel representing 1st, 2nd Respondent and submitted that both matters be

taken together since the issues in both matters are identical. However the Senior Counsel for the 3rd Respondent in the present application informed court that he has no instructions to represent the 3rd Respondent in CA/Writ/ 413/2013 and therefore he will only be limiting his submission to the present case.

This court observed that the 3rd Respondent in CA/Writ/413/2013 is also a director of the Petitioner Company who made a similar complaint with the 1st and 2nd Respondents and the impugned order challenged in this application too was also made on the same basis and decided to take up both matters i.e. CA/Writ /377/2013 and CA/Writ/413/2013 together but deliver separate Judgments in both applications, considering the fact that the 3rd Respondent in CA/Writ/413/2013 is not represented before this court.

During the arguments before us the Learned Counsel for the 3rd Respondent raised several preliminary objections with regard to the maintainability of the present applications and following are the main objections raised on behalf of the 3rd Respondent.

- a) The Petitioner is guilty of inordinate and unexplained delay and/or lashes
- b) The Petitioner has failed to comply with the mandatory provisions of Rule 3 (1) (a) of the Court of Appeal (Appellate Procedure) Rules of 1990
- c) The Petitioner is guilty of suppression and misrepresentation of material facts

I wish to consider these preliminary objections first, before considering the main argument of the parties.

The Petitioner is guilty of inordinate and unexplained delay and/or lashes

This court observes that the 3rd Respondent had failed to raise this objection in his statement of objections filed, even though he has raised several preliminary objections in the said statement of objections but raised this objection, during the argument before this court. When going through the

document and the pleadings before us, this court observes that the Petitioner in paragraph 20 of his Petition explains certain steps he has taken even after the impugned order dated 11.07.2013 was served on him. In support of his contention the Petitioner has produced marked P-9 a True Copy of an appeal submitted by the Petitioner (under his present name) to the Additional Commissioner General of Labour dated 14th September 2013. Even though there is no reply given by the 1st or 2nd Respondent to the said letter, the 1st Respondent in his affidavit filed before this court had admitted receiving the said appeal (paragraph 13 of the affidavit of the 1st Respondent). Therefore it appears that the Petitioner has placed material to explain his delay in filing the present application and we see no merit in the said preliminary objection.

The Petitioner has failed to Comply with the mandatory provisions of Rule 3(1)(a) of the Court of Appeal (Appellate Procedure) Rule 1990

Rule 3(1) (a) of the said Rules Reads as follows,

3(1) (a) “every application made to the exercise of the powers vested in the Court of Appeal by Articles 140 or 141 of the Constitution shall be by way of petition, together with an affidavit in support of the averments there in, and shall be accompanied by the original documents material to such application (or duly certified copies thereof) in the form of exhibits. Where a Petitioner is unable to tender any such document, he shall state the reason for such inability and seek the leave of the court to furnish such documents later where a Petitioner fails to comply with the provisions of this rule the court may, *Ex Mero Motu* or at the instance of any party, dismiss such application.

Whilst raising the said objection the 3rd Respondent had submitted that the Petitioner has failed to submit either the originals or certified copies of the impugned documents P-8 along with the Petition and also failed to sought leave from the Court of Appeal to submit the originals or certified copies and thereby acted in violation of the provisions of Rule 3(1)(a) of the said rules.

In support of his contention the 3rd Respondent relied upon several decisions of the Supreme Court and Court of Appeal.

In the case of *Sanmugavadivu V. Kulathilake 2003 (1) Sri LR 215*, the plaintiff filed with his application four documents including the judgment of the District Judge but failed to file all the material documents or to explain the reason for the failure and seek leave of court to furnish the necessary documents later as required by Rule 3 (1) (b) read with Rule 3(1) (a) of the said Rules. Instead the plaintiff amended her petition without notice to the 1st defendant and without leave of court. She filed one additional document with the amended petition and the balance documents with her counter objection.

In the said circumstances the Supreme Court concluded “In a situation where an application was made to the Court of Appeal without the relevant documents being annexed to the petition and the affidavit but has stated the reason for such inability and sought the leave of the court to furnish such documents on a later date, the court could have exercised its discretion and allow the Petitioner to file the documents on a later date. However on this occasion as pointed out earlier, no such leave was sought by the appellant and in the circumstances, the Court of Appeal could not have exercised its discretion in terms of Rule 3 (1)(a) and 3(1)(b) of the Court of Appeal (Appellate Procedure) Rule.”

In the next case the Petitioner has relied upon i.e. *Urban Development Authority V. Ceylon Entertainment Limited and Others 2004 (1) Sri LR 95*. The Supreme Court has observed that “it has been urged that the order of the District Court resulted in a miscarriage of justice in order to decide that question, namely whether answers to the interrogatories were filed within the time stipulated by the District Court, it is necessary to consider the journal entries in the original record maintained by the District Court.

However I find that the Petitioner has failed to file in the Court of Appeal duly certificated copies (as required by Rules) of such journal entries and the order of the District Court which are material to the revision application.

In any event in order to decide whether the Court of Appeal had considered the question whether the documents (certified copies) which the petitioner had failed to file in the Court of Appeal were material to the application, this court must necessarily peruse the application for Revision filed in the Court of Appeal.

Although, item No. 5 in the index filed by the Petitioner-Appellant in this court, refers to the petition and affidavit of the 1st Defendant-Petitioner filed in CA Application No. 1319/2000 (Revision) being at page 108 to 123. No copies of the said petition and affidavit filed in the revision application before the Court of appeal have been filed along with the application for special leave to appeal as the papers filed in this court do not go beyond page 88. The appellant has therefore failed to file duly certified copies of material even in this instance (present appeal).

The third and the final case relied upon by the 3rd Respondent is the decision by Court of Appeal in *Sasheendra Kumara Rajapakse V. M.G. Jayasinghe and others CA/Writ/61/2015* (CA minute dated 02.03.2015)

In the said case too the Respondent has relied upon on several observations made by the Court of Appeal.

Whilst considering the several objections raised by the Respondents in the said case, the Court of Appeal has finally concluded as follows,

“Since these two objections are interwoven to each other, this court has decided to consider the two objections together. In paragraph 20,21 and 22 of the petition the Petitioner explains as to how he was informed by the Governor of Uva Province of his decision to appoint the 21st Respondent as the Chief

Minister Uva Province and despite his objections, the appointment of 21st Respondent was informed to him by a letter dated 16.01.2015 which was marked as P-10. This document is only a letter send by the Governor. Petitioner while tendering the said letter marked P-10 pleads before court to grant and issue a mandate in the nature of *Writ of Certiorari* to quash the decision made by the Governor, Uva Province as evinced by the said letter. This is the only document tendered by the Petitioner to the effect that Petitioner's rights to hold office of the Chief Minister have been affected. Any decision purported to have been taken by the 1st and/or 2nd Respondent is not before court"....

"The next objection raised before this court was the failure by the Petitioner to seek leave of this court to furnish such document later. As pointed out by me earlier, Rule 3(1) (a) stipulates 'where a Petitioner is unable to tender any such documents, he shall state the reason for such inability and seek the leave of the court to furnish such document later.'

Petitioner has neither pleaded the above to reserve the right to file any document later nor pleaded a direction from this court to call for the document from the relevant authorities.

When both these objections are considered together this court observes that the failure by the Petitioner to produce before us the purported decision by the 1st and/or 2nd Respondent to appoint the 21st Respondent as the Chief Minister Uva Province and the Petitioner's failure to plead his inability and seek the leave of this court to furnish such document later and/or failure to plead for a direction from this court to call for such document from the relevant authority is a violation of Rule 3(1)(a) of the rules of this court. The above Rule further says 'where Petitioner fails to comply with the provisions of this Rule the Court may, *Ex Mero Motu* or at the instance of any party, dismiss such application.

Therefore this court decides to uphold the 3rd and 4th objections referred to above and accordingly makes order dismissing the application without cost."

From all the three decisions relied by the 3rd Respondent, it is clear that the circumstances of each case was much different to the present case. In all three cases the court has observed a grave laps from the part of the Petitioner when allowing the objection.

However when the identical objection was raised in the same case of *Sasheendra Kumara Rajapakse V. M.G. Jayasinghe*, the Court of Appeal whilst referring to a decision by the Supreme Court in *Yatagampitiya Loku Acharige Piyasena and Another V. Mary Jacintha Sandrasegaram SC Appeal 69/2001*, over ruled the said objection as follows,

“even in the application before us, as referred by me earlier, the Petitioner has tendered True Copies of documents he is relying in this case majority of those are Government Gazette, P-7, 8,10 and 11 are True Copies of letters either sent or received by the Petitioner. Respondents are not challenging those documents for its accuracy except the admissibility of P-10 as a decision by the 2nd Respondent. This issue will be discussed separately by me at a later stage of this order. Considering all these issues the Court decides to follows the decision by the Supreme Court in SC Appeal 69/2001 and decides to overrule this objection.”

When looking at the decisions in all three cases relied by the 3rd Respondent, it is clear that our courts were mindful of the circumstances of each case when acting under Rule 3 (a) and (b) of the Court of Appeal Rules. Even in the present case except for the fact that the Petitioner has failed to submit Original or duly Certified Copy, the accuracy of the said document is not challenged by the 3rd Respondent. In addition the Petitioner has sought permission of court in paragraph 22 of his petition to submit entire proceeding of the inquiry once he receives the complete Certified Copy. Considering all the matters discussed by me, I overrule the second preliminary objection raised by the 3rd Respondent.

The Petitioner is guilty of suppression and misrepresentation of material facts

The 3rd Respondent has raised several issues in support of this preliminary objection and the said issues can be summarized as follows,

- a. Petitioner has suppressed the document marked as 3R1 by the 3rd Respondent, which indicates that 3rd Respondent had specifically entrusted the overall operation of the Petitioner Company by its managing agent Merchant Bank of Sri Lanka.
- b. Petitioner has suppressed the proceedings and orders made by the Supreme Court in SCFR Application 317/2009 which was an application filed by the depositors of the Petitioner and two other affiliated companies where the Petitioner was restrained by the Supreme Court in making payment to its depositors and in dealing with the assets and funds of the Petitioner.
- c. Petitioner suppressed that the 3rd Respondent was compelled to tenders his letter of resignation in circumstances of duress
- d. Petitioner suppressed the letter dated 4th December 2011 marked 3R2
- e. Petitioner suppressed that the 3rd Respondent joined the Petitioner on the basis of continuity of service from the Finance Company Limited.

When considering the said issues raised by the 3rd Respondent in support of his 3rd ground of objection this court is of the view that none of the matter raised by the 3rd Respondent can be considered as material facts to the present case. With regard to the termination of the 3rd Respondent and issues related to the employment, it was revealed that the 3rd Respondent had gone before the Labour Tribunal. With regard to the financial issues, it is admitted by both parties that the Petitioner Company had faced financial crisis and during the said crisis several court cases were filed but none of those action will have direct bearing on the present case.

Under these circumstances I see no merit in the 3rd objection raised by the 3rd Respondent.

During the argument it was revealed that the 3rd Respondent had joined the Petitioner Company in the year 1999 as its Credit Manager and was promoted to the Senior Manager Credit in June 2000. In July 2003 he was promoted as the Assistant General Manager and in April 2004 appointed as the Acting General Manager. He was appointed General Manager in 25th May 2004 and in June 2005 joined the Board of Directors of the Petitioner Company.

The 3rd Respondent continued with his service until he resigned from his service on 25th November 2011. However the 3rd Respondent has challenged the said resignation, as a “constructive resignation” due to circumstances prevailed in the Petitioner Company but this court will refrains from making any comments on this so called resignation since it will have no direct bearing to the present case. However in this regard the Petitioner has produced two directives received from the Central Bank of Sri Lanka dated 12th July 2010 removing the individual executive powers of the directors of the Petitioner Company including the 3rd Respondent (7d) and removing eight existing Directors of the Petitioner Company including the 3rd Respondent dated 6th October 2011 (7g).

According to the 3rd Respondent he received a salary of Rs.200, 000/- up to January 2009 and it was reduced to Rs. 180,000/- since January 2009.

The petitioner which is a regulated Finance Company with the Central Bank of Sri Lanka was formerly a member of the Ceylinco Group of Companies which encountered several financial difficulties, was also facing financial difficulties by year 2009. During this period the Central Bank of Sri Lanka decided to appoint a Managing Agent/ Consultant to the Petitioner Company and the Merchant Bank of Sri Lanka was appointed as its Managing Agent /Consultant. (P-1)

However when the Petitioner faced financial crisis and found it difficult to payback its depositors, the depositors of the Petitioner Company had filed Fundamental Rights applications in the Supreme Court and the Supreme Court had issued interim order restraining the Petitioner and its associate companies from selling, transferring or in any manner changing the legal status of the movable and immovable assets and funds belong to the said companies. As a result Petitioner faced more difficulties including paying the remuneration of its employees.

The Petitioner has submitted before this court two documents marked P-4 and P-5.

By Document P-4 the Central Bank had directed the then Chairman of the Petitioner Company to restrict the emoluments paid to its director to Rupees 200,000/- until the liquidity position is improved.

Document P-5 is a directive issued by the Central Bank of Sri Lanka with regard to the Standard Remuneration Policy for Employee Directors of Registered Finance Companies dated 19th August 2010 addressed to CEO of the Petitioner Company with copies to the 3rd Respondent as well. By the said directive the Central Bank has categorized the Finance Companies in to three, and the salaries of the directors of each category are reflected in the said directive. According to the Petitioner, the Petitioner Company comes within the second category and therefore the maximum remuneration payable to its directors were Rs. 100,000/-.

However, consequent to a complaint made by the 3rd Respondent, the 1st Respondent had commenced an inquiry for non-payment of the salary and the gratuity under the Provisions of the Shop and Office Employees (Regulation of Employment and Remuneration) Act No. 19 of 1954.

It was evident before this court that the Petitioner has taken up the same position before the 1st Respondent but the 1st respondent by his order dated 11.07.2013 directed the Petitioner to pay sum of Rs. 1.748.000/- as arrears of salaries for the period January 2009 to November 2011.

During the Argument before this court the Petitioner submitted that being a registered Finance Company they are bound by the directives of the Central Bank of Sri Lanka and argued that the order made by the 1st Respondent under section 53(3) of the Shop and Office Employees (Regulation of Employment and Remuneration) Act 19 of 1954 was made without considering the legal implications of P-4 and P-5 and therefore the said order has been made ultra virus of the power of the 1st and 2nd Respondents.

Section 53(3) of the Shop and Office Employees (Regulation of Employment and Remuneration) Act 19 of 1954 reads thus,

53(3) where an employee has not been paid the whole or part of the remuneration required by this act to be paid to him by his employer, the Commissioner may, if he thinks fit so to do, by written notice require the employer to pay such amount or the balance of such

amount to the Commissioner within the time specified in the notice so that the Commissioner may remit it to such employee. Where the employee when served with such notice pays such amount or such balance directly to such employees instead of transmitting it to the Commissioner as required by such notice, he shall be deemed not to have paid amount or such balance to such employee.

As observed by this court, the 1st Respondent before whom the inquiry was conducted on the complaint made by the 3rd Respondent, had strictly adhered to the above provision and considered that the 3rd Respondent was entitled under law to draw a salary of Rs. 200,000/- and calculated the dues to be paid to the 3rd Respondent and accordingly made the impugned order. However there is no indication in the said order (P-8) or in the statement of objection filed by the 1st Respondent that the said 1st Respondent considered the position taken up by the Petitioner before coming to a decision.

However the Petitioner has submitted along with his documents a comprehensive submission dated 11th July 2012 addressed to the 1st Respondent marked P-7 and P-7a-o but there is no material available before us to satisfy whether the 1st Respondent had considered the said submission before making the impugned order. However in paragraph 11 of the affidavit of the 1st Respondent, the said Respondent had admitted the receipt of P-7 and P-7a-o.

When considering the documents submitted by the parties and the arguments placed before this court it appears that the Director Board of the Petitioner including the 3rd Respondent had met after the receipt of P-4 and decided to adjust their emoluments as directed by the Central Bank twice. Thereafter on the receipt of P-5 the Standard Remuneration Policy for Employee Director of Registered Finance Companies dated 19th August 2010 the Directors Remuneration was further adjusted in line with the said direction. With the final adjustment the salary of the 3rd Respondent was further reduced to Rs. 100,000/-.

The question before this court at this stage is whether the Central Bank can decide the salaries of the Employees and Directors of the Finance Companies against the terms and conditions of their service agreement and/or letters of appointments and the powers vested on the 1st and/or 2nd Respondent under section 53 (3) of the Shop and Office Employees (Regulation of Employment and Remuneration) Act will continue to prevail over the directives of the Central Bank.

Section 9 of the Finance Companies Act No 78 of 1988 reads thus,

Section 9 (1) Notwithstanding the provisions of any other law, the Board may give directions to Finance Companies or to any group or category of Finance Companies regarding the manner in which any aspect of the business of such companies are to be conducted and in particular

(a) - (q).....

r) Restriction on the types of activities that may be carried by Finance Companies.

(3) For the purpose of this Act, the Board may give directions where necessary to any Finance Company in particular on such matters as are specified in subsection (1).

The said Act was amended by the Finance Companies (Amendment) Act No. 23 of 1991 and section 3 of the amending Act reads thus,

Section 3- Section 9 of the principal enactment is hereby amended in subsection (1) thereof, by the addition immediately after paragraph (r) of the following new paragraph

rr) the remuneration and other payment to directors or employees of Finance Companies by way of salary, allowance, perquisites and reimbursement of expenses.

In the afore said circumstances, it is clear that the legislature in its wisdom had vested with the Central Bank the power to determine the salary of any Directors of a Finance Company notwithstanding the provisions of any other law.

Since the Shop and Office Employees (Regulation of Employment and Remuneration) Act was in operation at the time the Finance Companies Act came into operation it is correct to conclude that the legislature was mindful of the provisions of the Shop and Office Employees (Regulation of Employment and Remuneration) Act when introducing these changes to the Finance Companies Act.

Therefore it is correct to conclude at this stage that the provisions the Finance Companies Act has provided the Central Bank Board to decide the remuneration of the Directors/ Employees of the Finance Companies and therefore any decision taken under section 53 (3) of the Shop and Office Employees (Regulation of Employment and Remuneration) Act with regard to the salaries of the Directors and or Employees will have to be taken having considered the directions given under the Finance Companies Act.

It was brought to the notice of this court of a decision by the Court of Appeal in CA/Writ/315/2011 on similar facts with regard to an order made by the 1st and/or 2nd Respondent regarding an employee of the Petitioner Company. Having gone through the said decision we are of the view that,

- a) The said decision has a persuasive values before us but we are not bound to follow the said decision
- b) When deciding the said case the court was not informed of the provisions of the Finance Companies Act and the said decision was taken having considered the provisions of the Shop and Office Employees (Regulation of Employment and Remuneration) Act only
- c) Even though the provisions of Finance Companies Act had provided the Board to give directions with regard to the remuneration and other payment to directors or employees

of Finance Companies, No directives were placed before us with regard to the remuneration of employee of Finance Companies issued by the Board and therefore it is correct to conclude that the applicable law in such a situation is the provisions of the Shop and Office Employees (Regulation of Employment and Remuneration) Act.

For the reasons discussed above we decide to grant a mandate in the nature of *Writ of Certiorari* quashing the decision of the 1st Respondent contained in P-8 as prayed in paragraph (b) to the Petition.

PRESIDENT OF THE COURT OF APPEAL

H.C.J. Madawala J

I agree,

JUDGE OF THE COURT OF APPEAL