

**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/413/2013

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. R.G.S. Jayasekara,
No. 184/5, Kirimetiyyagara,
Kadawatha.

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

Argument on: 12.10.2015

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-9.

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 19.06.2013 directing the Petitioner to deposit a sum of Rupees 1,162, 880/- with the 1st Respondent.

At the commencement of the Argument, it was brought to the notice that both matters before this court i.e. CA/377/2013 and CA/417/2013 are similar in nature and can be taken together since the issues in both matters are identical. However the Senior Counsel for the 3rd Respondent in CA/Writ/377/2013

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 argument it was revealed that the 3rd Respondent had joined the Petitioner Company in the year 2003 as its Finance Manager and was promoted as an Executive Director subsequently and joined the Board of Directors of the Petitioner Company.

The 3rd Respondent continued with her service until she resigned from 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 refrain 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 (E) and removing eight existing Directors of the Petitioner Company including the 3rd Respondent dated 6th October 2011 (H).

According to the 3rd Respondent she received a salary of Rs.290, 000/- up to January 2009 and it was reduced to Rs. 160,000/- 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 the 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 19.06.2013 directed the Petitioner to pay a sum of Rs. 1.162.880/- 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 the Petitioner is 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 No. 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 No. 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-9) 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-m 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-m.

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 mindfull 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 employees 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-9 as prayed in paragraph (f) to the Petition.

PRESIDENT OF THE COURT OF APPEAL

H.C.J. Madawala J

I agree,

JUDGE OF THE COURT OF APPEAL