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 Writs of Certiorari and Prohibition in terms of Article 140 of the constitution

C A (Writ) Application No. 236/ 2015

Habarana Lodge Limited,

No. 117,

Sir Chittampalam A Gardiner Mawatha,

Colombo 02

PETITIONER

-Vs-

1. M D C Amarathunga

   Commissioner General of Labour,

   Labour Secretariat,

   Colombo 05

2. R M I D K Rathnayake

   Assistant Commissioner of Labour,

   District Labour Office,

   Anuradhapura

3. M K S Siriwardena

   Labour Officer,

   District Labour Office,

   Anuradhapura

4. N Dayawathie

   Anuradhapura Road,

   Habarana

5. Food Beverage & Tobacco Industries Employees Union,

   No. 513-2/1,

   Elvitigala Mawatha,

   Colombo 05

6. D Wimalasooriya

Deputy Chief Secretary,

Food Beverage & Tobacco Industries Employees Union,

No. 513-2/1,

Elvitigala Mawatha

Colombo 05

RESPONDENTS

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

P. Padman Surasena J

Counsel: Maithri Wickremasinghe PC with Mr. Javeed Mansoor for the Petitioner

Sumathi Dharmawardena DSG for the 1st, 2nd and 3rd Respondents

S H A Mohamed for the 4th, 5th and 6th Respondents

Written submissions on: 2016-04-27

Decided on: 2016-06-01

JUDGMENT

P Padman Surasena J

The Petitioner in this proceeding is a company which owns a five star hotel situated in the North Central province. He has prayed in his petition *inter alia,*

(i) for a mandate in the nature of a writ of Certiorari to quash the decision by the 2nd Respondent (in **P 16**) to prosecute the Petitioner in the Magistrate`s Court of Kekirawa under the provisions of the Payment of Gratuity Act No. 12 of 1983.

(ii) for a mandate in the nature of a writ of prohibition to prohibit the 1st, 2nd and 3rd Respondents from instituting or continuing with legal proceedings to recover the sum of Rs. 46, 637.50 or any part thereof under the provisions of the Payment of Gratuity Act No. 12 of 1983 and/or the Industrial Disputes Act

(iii) for a writ of prohibition to prohibit the 1st, 2nd and 3rd Respondents from continuing with proceedings instituted in the Magistrate`s court of Kekirawa case No. 12922 / Labour

(iv) for a writ of Prohibition to prohibit the 1st,2nd and 3rd Respondents from taking any action against the Petitioner based on the decision contained in the document marked **P 16** dated 2014-10-13.

When this matter was supported in this court on 2015-06-05 this court had granted the interim reliefs prayed for by the Petitioner in terms of prayers (g)(I) of the petition. However, as learned counsel for the Respondents objected to the extension of the stay order, this court held an inquiry relating to that issue on 2016-02-24. As the main issues contested by the respective parties were sufficiently argued in the course of the submissions made by all the counsel, at the said inquiry, this court with the concurrence of the counsel directed that the rest of the pleadings be filed in court and that thereafter written submissions also be filed to enable this court to formally conclude the argument of this case. This court also indicated to the learned counsel for all the parties that it would thereafter take steps to fix a date to pronounce the judgment in this case. Learned counsel for all the parties, pursuant to this arrangement, have filed the relevant papers, after which this court fixed the date to pronounce the judgment.

Main complaint of the learned President's Counsel who appeared for the Petitioner, is that the 1st, 2nd and 3rd Respondents have not only failed to inform him of any decision but also failed to give reasons for any such decision which may have been taken at the end of the inquiry, which he says he attended, as summoned by the 3rd Respondent by the documents marked **P 3**, **P 6** and **P 7**.

It is in this backdrop that the learned President`s Counsel appearing for the Petitioner, sought to argue that **P 16** should be quashed by a writ of Certiorari for the reason that the decision contained therein is a decision that has been taken arbitrarily and not as pursuant to the inquiry referred to in the documents marked **P 3**, **P 6** and **P 7**. It is on that basis that the learned President`s Counsel for the Petitioner submitted that the 1st, 2nd and 3rd Respondents failed to hold an inquiry in terms of section 8 (1) of the Payment of Gratuity Act No. 12 of 1983.

Further, it was the position of the Petitioner that he is not liable to pay gratuity to the 4th Respondent, as an employer becomes liable to pay gratuity under Section 5 (1) of the Payment of Gratuity Act No. 12 of 1983, only where an employee has "a period of service of not less than five completed years" under that employer.

It would be helpful to start off consideration of the above arguments by reproducing the relevant parts of section 8 of Payment of Gratuity Act No. 12 of 1983. They are as follows:

Section 8 (1)

"where any default is made in the payment of any sum due as gratuity under this Act or where the gratuity due under this Act cannot be recovered under the provisions of section 4 or under the provisions of sub section 5 of section 17 of the Land Acquisition Act, the commissioner may issue a certificate after such inquiry as he may deem necessary, stating the sum due as gratuity and the name and place of residence of the defaulter to the magistrate having jurisdiction in the division in which the estate or establishment is situated. The Magistrate shall, thereupon, summon the defaulter before him to show cause why further proceedings of the recovery of the sum due as gratuity under this Act should not be taken against him and in default of sufficient cause being shown, the sum in default shall be deemed to be a fine imposed by a sentence of the Magistrate on such defaulter for an offence punishable with fine only ..... ".

Section 8(2)

"The commissioner's certificate shall be *prima facie* evidence that the amount due under this Act from the defaulter has been duly calculated, and that the amount is in default."

Section 8(3) - 8(7) ..... *(Not reproduced here)*

In order to ascertain the sustainability of the argument that 1st, 2nd and 3rd Respondents have failed to hold an inquiry in terms of section 8 (1) of the Payment of Gratuity Act No. 12 of 1983, it is first necessary to consider as to what extent the Petitioner has got involved in whatever the type of proceedings had before the 1st, 2nd, and 3rd Respondents.

The petitioner has, according to paragraph 06 of the petition and its corresponding averment in the affidavit (paragraph 07), filed by him, has admitted that he attended the inquiry conducted by the 3rd Respondent pursuant to the documents marked **P 3**, **P 6** and **P 7**. Further, the Petitioner in the same paragraph has also admitted that he has filed written submissions at the said inquiry conducted by the 3rd Respondent. The Petitioner has even gone on, not only to annex a copy of the said written submissions to his petition, marked as **P 8**, but also the documents he has submitted along with his said written submissions for the consideration of the 3rd Respondent marked as **P**

9, **P 10 - P 15**. Indeed the parties are not at variance on these points as the statement of objections of the 1st, 2nd and 3rd Respondents too confirm these positions.

It would be in sequence for this court to move next on to consider the type of statutory obligation which section 8 of the Act has vested in the hands of Commissioner of Labour. This aspect has been discussed by this court in Collettes Ltd Vs Commissioner of Labour and others[1]. In that case, the complaint made to the Court of Appeal by the learned counsel for the Petitioner in that case was that he was not allowed to lead evidence at the inquiry and that therefore the Inquiring Officer failed to hold a proper and full inquiry. It was therefore submitted to court on behalf of the Petitioner in that case that the order made by the Inquiring Officer under section 8 was not a valid order in law.

However, the court of Appeal in that case, held

i. that there is no specific requirement that the commissioner should call evidence.

[1] 1989 [2] SLR 6

ii. that all what seems to be necessary is for the commissioner to be satisfied of the relevant matters necessary to decide on the question whether a person is entitled to gratuity or not.

iii. that in the circumstances and in the light of the facts of that case, the Inquiring Officer had made such inquiry as he deemed necessary, as required by law, before he made his recommendation to award gratuity.

iv. that therefore there is adequate compliance with the provisions of Payment of Gratuity Act, and

v. that therefore the conclusion arrived at by the Inquiring Officer is valid in law.

The 1st, 2nd and 3rd Respondents have adopted a certain procedure to conduct the inquiry they are required to conduct under Section 8(1) of the Gratuity Act. The Petitioner states that it is not in conformity with that provision of law. However the Petitioner has at no stage suggested or given at least any indication as to what type of procedure he wished those Respondents should have adopted. The Gratuity Act No 12 of 1983 is silent as to what kind of procedure the Commissioner of Labour should follow in conducting this type of inquiry. In order to resolve this issue it is now time to look at two of the decided cases in England.

These two cases have featured in a subsequent Privy Council judgment pertaining to a Sri Lankan case.

The first of those two cases is Russel Vs. Duke of Norfolk and others[2]. One of the issues to be decided by the Court of Appeal in England in that case is whether the inquiry held by the stewards of the Jockey Club was in accordance with the principles of natural justice. Lord Justice Tucker while holding that it is a mistake to treat all inquiries as if they are trials, has stated in his judgment as follows. "..... Throughout this inquiry he was, at every stage, it seems to me, given an opportunity of presenting his case and of asking any questions which he desired to ask. It is true that he was not in terms asked: "Have you got any witnesses ? Do you want an adjournment ? " A layman at an inquiry of this kind is, of course, at a grave disadvantage compared with a trained advocate, but that is a necessary result of these domestic tribunals which proceed in a somewhat informal manner. Counsel for the plaintiff, in the course of his forceful argument on this point, again and again said: "What would be said of local justices who acted in this way ?" With all due respect, the position is totally different. This matter is not to be judged by the standards applicable to local justices. Domestic tribunals of this

[2] (1949) 1 AER 109

kind are entitled to act in a way which would not be permissible on the part of local justices sitting as a court of law. .....[3] "

In the case of Local Government Board Vs Arlidge[4] which is the second of those two cases above mentioned, one of the issues to be decided by the House of Lords was whether the procedure adopted by the Appellant in that case which is Local Government Board to determine the impugned appeal was contrary to the rules of natural justice. Viscount Haldane L C in the course of his judgment stated as follows. " ..... When the duty of deciding an appeal is imposed, those whose duty it is to decide it must act judicially. They must deal with the question referred to them without bias, and they must give to each of the parties the opportunity of adequately presenting the case made. The decision must be come to in the spirit and with the sense of responsibility of a tribunal whose duty it is to mete out justice. But it does not follow that the procedure of every such tribunal must be the same. In the case of a Court of law tradition in this country has prescribed certain principles to which in the main the procedure must confirm. But what the procedure is to be in detail must depend on the nature of the tribunal. In modern times it has become increasingly

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[3] at page 117
[4] (1915) A C 120

common for Parliament to give an appeal in matters which really pertain to administration, rather than to the exercise of the judicial functions of an ordinary Court, to authorities whose functions are administrative and not in the ordinary sense judicial. Such a body as the Local Government Board has the duty of enforcing obligations on the individual which are imposed in the interests of the community. Its character is that of an organization with executive functions. In this it resembles other great departments of the state. When, therefore, Parliament entrusts it with judicial duties, Parliament must be taken, in the absence of any declaration to the contrary, to have intended it to follow the procedure which is its own, and is necessary if it is to be capable of doing its work efficiently. ..... "[5]

Indeed both these cases above mentioned, have been referred to, by the Privy council in the case of The University of Colombo Vs E F W Fernando[6]. In that case the University of Colombo challenged before the Privy Council a decision by the Supreme Court declaring the Vice Chancellor's decision to suspend the Respondent in that case, E F W Fernando, a student of the University. Clause 8 of the "General Act" No

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[5] (supra) at page 152
[6] 61 NLR 505

1 Chapter VIII Part I which prescribed the examination procedure of the University under which the Vice chancellor acted, is as follows.

"Where the Vice Chancellor is satisfied that any candidate for an examination has acquired knowledge of the nature or substance of any question or the content of any paper before the date and time of the examination, or has attempted or conspired to obtain such knowledge, the Vice Chancellor may suspend the candidate from the examination or remove his name from any pass list, and shall report the matter to the Board of Residence and Discipline for such further action as the Board may decide to make.[7]"

The Supreme Court in its judgment[8] took the view that the mode of inquiry adopted by the Vice Chancellor violated the principles of natural justice and held that the suspension was null and void. However the Privy Council setting aside the judgment of the Supreme Court took the view that the question whether the requirements of natural justice have been met by the procedure adopted in any given case must depend to a greater extent on the facts and circumstances of the case in point.

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[7] (supra) at page 505
[8] This judgment is reported in 58 NLR 265

The Privy Council went on to state as follows. " ....Turning now to the actual terms in which the Vice Chancellor is invested with the quasi-judicial function here in question, it is to be observed that all that clause 8 provides is that where the Vice Chancellor is satisfied that any candidate has acquired knowledge of the nature or substance of any question or the content of any paper before the date and time of the examination "the Vice Chancellor ....shall report the matter to the Board of Residence and Discipline .... " The clause is silent as to the procedure to be followed by the Vice Chancellor in satisfying himself of the truth or falsity of a given allegation. If the clause contained any special direction in regard to the steps to be taken by the Vice Chancellor in the process of satisfying himself he would, of course, be bound to follow those directions. But as no special form of procedure is prescribed it is for him to determine the procedure to be followed as he thinks best, but, to adapt to the present case the language of the judgment of this Board in De Verteuil V Knaggs[9] at page 560, subject to the obvious implication that some form of inquiry must be made, such

[9](1918) A. C. 557

as will enable him fairly to determine whether he should hold himself satisfied that the charge in question has been made out."[10]

Towards resolving the issue at hand, the authorities referred to above make it possible for this court to come to the following inferences. They are,

I. that the mere presence of the word "inquiry" in a statute does not necessarily mean that leading oral evidence, subjecting such witnesses for cross examination etc. must take place.

II. that where the terms of a statute demand that a particular procedure should be followed, such procedure must be adopted as the procedure for such inquiry.

III. that where the statute is silent about the procedure to be adopted, the inquiring body is free to adopt a procedure on its own, but subject to the condition that the procedure so adopted must provide adequate opportunity for the party under investigation to place its case.

IV. the inquiring body must ensure that the rules of natural justice are observed adequately.

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[10] (Ibid) at page 512

V. that where the terms of a statute have identified the scope of the inquiry, what is expected of the inquiring body is to be mindful of that scope when conducting that inquiry.

Section 8 (1) of the Act has neither specified nor given any indication regarding any guideline as to how an inquiry under that section should be conducted by the Inquiring Officer. Instead the section has given a discretion for the Inquiring Officer to decide on the scope and the manner in which it should be conducted. This could be gathered from the wording "... as he may deem necessary...[11]".

Indeed it may not be correct to say that the section is silent about the procedure because of the indication it has given namely the words "... as he may deem necessary...", as this phrase qualifies the scope of the inquiry to be conducted. This could have a direct impact on the procedure to be adopted also.

It has been the approach of our courts to derive some guidelines with regard to the procedure to be adopted in such situations from the words of the statute itself. Case of Brown & Company Vs Ratnayake and 3 others[12] is a good example in that regard. Petitioner in that case

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[11] section 8(1) of Gratuity Act No 12 of 1983
[12] (1986) Vol. 1 Bar Association Law Journal Reports Part VI, page 229

challenged befor the Court of Appeal, the decision of the Arbitrator calling upon him to begin and start leading evidence on his behalf first. the relevant provision in section 17 of the Industrial Disputes Act is to the effect that " .....the arbitrator shall make all such inquiries into the disputes 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....." The approach taken by this court in that case could be gathered by the following quotation from its judgment in that case. It is as follows. " .....It is important to note that the section enacts that the arbitrator shall make all such inquiries. The section does not say that the arbitrator shall hold an inquiry. In my view, the word 'make' is a pointer to how the inquiry commences. The word 'make' in my view throws the ball in to his court requiring the arbitrator to initiate what inquiries he considers are necessary. ..... ".

Similarly, when one attempts to interpret the wording "... as he may deem necessary... in section 8(1) of the Gratuity Act, the question arises as to who may deem necessary ? The wording " ....the Commissioner may issue a certificate after such inquiry as he may deem necessary ....." answers this question beyond any ambiguity. It is none other than "the Commissioner".

It is common knowledge that in legal practice one must establish the existence of necessary ingredients if that person expects to prove a legal liability of another. However in the instant inquiry it has not become necessary for the Inquiring Officer to go into all of such ingredients constituting the impugned liability which the 1st, 2nd, 3rd Respondents would generally have been expected to be satisfied of, in order for them to come to a conclusion that the Petitioner is liable to pay gratuity to the 4th Respondent. The reason for this is that most of these ingredients were not in dispute. This is so because the fact that the 4th Respondent had worked under the Petitioner from time to time has not been disputed by the Petitioner. The only issue that the Petitioner has contested is the issue that the 4th Respondent did not have a period of service not less than five completed years under the Petitioner.

It is in this backdrop that the 3rd Respondent has rightly chosen to focus on the only contested point, namely whether the 4th Respondent has a period of service not less than five completed years under the Petitioner. That is the kind of inquiry that the 3rd Respondent has deemed necessary under section 8(2) of the Act.

In these circumstances, task of this court in dealing with an application for a writ of Certiorari should be, to see whether there has been a sufficient compliance of section 8 (1) of the Act. Indeed that is exactly what this court had done in Collettes Ltd Vs Commissioner of Labour and others[13] case also when it held that there is adequate compliance with the provisions of Payment of Gratuity Act

Before this Court could finally answer the above question, it would be appropriate to deal with the other complaint made by the learned President's Counsel for the Petitioner. The said complaint is that the 1st, 2nd and 3rd Respondents have failed to give reasons for the findings arrived after the impugned inquiry.

The document marked **R 3** annexed to the statement of objections filed by the 1st, 2nd and 3rd Respondents sheds light on this question. It is useful at this stage to bear in mind as to why the Petitioner says that he was affected by the absence of reasons. As mentioned before it is the contention of the Petitioner that he is not liable to pay gratuity because the 4th Respondent did not have a period of service not less than five completed years under the Petitioner. It is therefore the submission of the Petitioner that the Petitioner cannot and should not become liable to

[13] (Ibid) at page 13

pay gratuity to the 4th Respondent in view of the interpretation given in section 20 of the Act . It is timely to recall again and bear in mind that the fact that the 4th Respondent had worked under the Petitioner from time to time, has been admitted by the Petitioner. As per **P 17** this period is admitted as from November 2006 to February 2011[14] and as per **P 8** it is from January 2007 to February 2011[15].

The above facts show that the scope and the focus of the inquiry by the 3rd Respondent must have been to ascertain whether the 4th Respondent has had a period of service of not less than five completed years under the Petitioner, and that is exactly what the 3rd Respondent had done in this case. According to the document marked P 24 the 2nd Respondent has not only concluded that the 4th Respondent is entitled to gratuity in terms of section 8 (1) of the Act, but also has set out the basis upon which he has come to that conclusion.

In these circumstances this court is of the considered view

I. that the 1st, 2nd and 3rd Respondents have arrived at the impugned conclusion after such inquiry as they had deemed necessary.

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[14] Para 3(a)
[15] Under the sub heading "BACKGROUND"

II. that in conducting the said inquiry, the said Respondents had adequately afforded the Petitioner an opportunity to place his case before the said Respondents.

III. that therefore the said Respondents have not breached any rule of natural justice.

IV. that therefore the said Respondents have sufficiently complied with section 8(1) of the Gratuity Act No 12 of 1983.

Learned President's Counsel while attacking the above conclusion arrived at by the 3rd Respondent, also contested in this proceedings before this court, the fact that the 4th Respondent does not have a period of service of not less than five completed years under the Petitioner. It was his submission that therefore the Petitioner has faced a grave injustice.

In view of this submission, the next question that would arise for consideration before this court, is as to whether this court is in a position to agree or disagree with the conclusion arrived at by the 3rd Respondent more fully mentioned in the document marked **R 3**.

Section 8 (2) of the Act has provided for the steps that the Petitioner should take when he is placed in this type of situation. The contents of section 8 (2) clearly points to the fact that it is not the writ jurisdiction of

this court that the Petitioner should invoke at this juncture of the Magistrate's Court Kekirawa case.

Section 8 (2) of the Act states that the Commissioner's certificate shall be *prima facie* evidence that the amount due under this Act from the defaulter has been duly calculated, and that the amount is in default.

In the case of Ex employer Vs Deputy Commissioner of Labour[16], the Supreme Court held that showing cause against the certificates issued under the Gratuity Act is not limited to showing that the Petitioner was not the person named as the defaulter in the certificate, that he has paid the amount specified in the certificate and that he is not resident within the jurisdiction of the Magistrate's Court but also extends to showing that the sums specified in the certificate are not due or that they have been incorrectly calculated, because under section 8 (2) of the Act, the Commissioner's certificate is only *prima facie* evidence. It is open to the Petitioner to displace the effect of the *prima facie* evidence by offering further evidence of an inconsistent or contradictory nature.

As referred to above when one looks at the prayers of the Petitioner, Petitioner has requested this court to issue a writ of Certiorari quashing the decision contained in the document marked **P 16** and the decision

[16] 1991 [1] SLR 222

to prosecute the Petitioner in the Magistrate's Court of Kekirawa under the provisions of the Payment of Gratuity Act and to issue a writ of Prohibition prohibiting the 1st, 2nd and 3rd Respondents from instituting or continuing with proceedings to recover any gratuity payable under that Act.

If this court is to consider granting these reliefs, this court will have to first conclude that the Petitioner is not liable to pay gratuity to the 4th Respondent in terms of the provisions of the Payment of Gratuity Act No. 12 of 1983. However it is only through the mechanism that has been provided for in the Gratuity Act, namely section 8 (2), that the conclusion above referred to, could be arrived at. This is so because the Petitioner and the 4th Respondent are at loggerheads on major ground of fact.

This court in Thajudeen Vs Sri Lanka Tea Board and another[17] , held that the most appropriate procedure for the settlement of a dispute when major grounds of facts are being disputed by parties is the proceedings by way of regular procedure before the appropriate court of first instance. Such an action would not only be equally convenient,

[17] 1981 [2] SLR 471

beneficial and an equal remedy, but would be the best and the most effective way to settle that dispute.

As has been mentioned above, the learned President's Counsel made submissions on the argument that the 4th Respondent does not have a period of service of not less than five completed years under him, and hence he is not liable under section 5(1) of the Act to pay gratuity to the 4th Respondent. Although it is not for this court to decide on that issue, this judgment would not be complete unless this court at least superficially touch on that issue, as parties have made submissions on that issue as well.

It will suffice therefore to note that the 4th Respondent has been in service for 7 years with the Petitioner and that her service has temporarily ceased only during the months of February and August each year as a routine practice. Further it should also be noted that according to section 20 of the Act "completed service" means uninterrupted service and includes service which is interrupted by approved leave on any ground whatsoever, a strike or lockout or cessation of work not due to any fault of the workman concerned.

Therefore the issue to be decided in this case is whether the interruption of work during the months referred to above is due to any fault of the

4th Respondent or not. This is something that has to be decided by the Magistrate's Court in the case that has already been filed before it.

Writ jurisdiction of this court is an extraordinary jurisdiction which this court should exercise when it is really necessary. On the other hand, it is not open for this court to approbate to itself and assume the jurisdiction which has been conferred on the Magistrate by the statute. And in any case one cannot decide this question of fact without holding a proper inquiry.

Time and again the courts have held that Certiorari being a discretionary remedy will not ordinarily be granted unless and until other remedies reasonably available and equally appropriate have been exhausted.

In these circumstances, and for the foregoing reasons this court is of the view that the 1st, 2nd, and 3rd Respondents have held an inquiry in terms of section 8(1) of the Gratuity Act and that the mode they had adopted for them to be satisfied that a certificate should be filed in the Magistrate's Court against the Petitioner is a step rightly taken with no room for the Petitioner to complain regarding any breach of rules of natural justice.

Hence this court is of the view that there exists no basis for this court to grant any of the prayers in this application. This application should therefore stand dismissed. Learned Magistrate of Kekirawa should be free to continue with the case before it. We make no order with regard to costs.

Application is refused.

JUDGE OF THE COURT OF APPEAL

Vijith K. Malalgoda PC J

I agree,

PRESIDENT OF THE COURT OF APPEAL