

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

**In the matter of an application for
mandate in the nature of Writ of
Certiorari under and in terms of Article
140 of the Constitution of The
Democratic Socialist Republic of
Sri Lanka**

Ceylinco Tax and Financial Consultants
(Pvt) Ltd
153 1/1, Dharmapala Mawatha
Colombo 7.

Petitioner

CA Writ 400/2014

Vs,

1. Mr. Herath Yapa
The Commissioner General of Labour
Department of Labour
Labour Secretariat
Colombo 05.
2. The Assistant Commissioner of Labour
Department of Labour
Labour Secretariat
Colombo 05.
3. W.M. Karunaratne
Acting Deputy Commissioner of Labour
Department of Labour
Labour Secretariat
Colombo 05.
4. P.A.Lionel
6th Floor
Colombo Central District Labour Office
Department of Labour
Labour Secretariat
Colombo 05.
5. Seylan Bank PLC
Seylan Towers
90, Galle Road
Colombo 03.
6. M.G.D.P. Dayananda
106, Mathalapitiya
Walawla, Matale.
7. CT and FC secretarial Services (Pvt)
Ltd
153 1/1 Dharmapala Mawatha
Colombo 07.

Respondents

**Before : Vijith K. Malalgoda PC. J (P/CA) &
S. Thuraija PC. J**
Counsel : Hejaaz Hizbullah for the Petitioner
Anusha Fernando DSG for the 1st to 4th Respondent
Shyama Gamage for the 5th Respondent

Order on : 31st March 2017

Order

S.Thuraija PC J

The Petitioner above-named is a company incorporated under the laws of Sri Lanka bearing Company Registration No. N(PVS) 28194. The certificate of incorporation bears a date as 13/03/2001. It appears that the Petitioner also is part of Ceylinco consolidated which was a Conglomerate of companies.

The Petitioner's grievances are that the Commissioner General of Labour has filed a certificate (marked as **P13** and attached to the petition) in the Magistrate Court of Colombo against the said company, seeking to recover Rs.50,000 payable to the 6th Respondent for the period of 31st January 2005 to 30th June 2010 together with a surcharge of Rs.15,000.

The sole relief prayed for by the Petitioner is to have the said certificate be quashed by way of a Writ of Certiorari. The Petitioner submits that the respondents mainly 1st, 2nd & 3rd Respondents have not exercised their power properly namely the 2nd Respondent had not properly determined that the 6th Respondent was an employee of the Petitioner.

Considering the material before the court, I find that there was an inquiry held by the 2nd Respondent, on receiving a complaint from 6th Respondent for non-payment of gratuity, non-release of "B" card and service letter to him.

At the inquiry on the 1st date the Deputy Chairman appeared. Therefore, Deputy Chairman and authorised executive officers appeared and represented the Petitioners. It is evident that the Petitioners have admitted before the Commissioner of Labour that the 6th Respondent was employed by them from the 31/01/2005 to 30/06/2009. It is the contention of the Petitioner is that 6th Respondent had not served the required period of 5 years to get eligibility to receive gratuity under Section 5 of the **Payment of Gratuity Act No. 12 of 1983** as amended. Therefore, the Petitioner says it's not liable to make the payment.

The Petitioner submitted that the proceedings before the Commissioner of Labour be examined by this court. It is also observed that the certified copies filed by the Petitioner were illegible. Therefore, the court decided to call for the file pertaining to the inquiry through the Attorney General. It was produced and on the request of the court the learned DSG submitted typed copies of the proceeding marked R1 – R4.

The Petitioner was also permitted to peruse the file in the presence of the DSG at her chambers.

The inquiry records reveal that the Petitioner who was represented by the Deputy Chairman, and the executive officers at the inquiry moved time to get particulars of payment of salary to the 6th Respondent from "HNB", on two occasions, namely the 8th of July 2012 and 14th of November 2012, the application was made and it was recorded up to now this was not corrected by the Petitioner or its representative. According to the available papers it appears that the 6th Respondent was lent or attached with 5th Respondent namely "Seylan Bank PLC."

The Petitioner mainly contents his argument that the Commissioner of Labour had not determined the Petitioner as a defaulter, which is a precedent fact before he issues a determination.

Considering arguments of all, the court observes the following:

- a. The Petitioner admits that there existed an employer-employee relationship between itself and the 6th Respondent (by virtue of the contract of employment, P8) but states that the said employment had ceased prior to completion of 5 years, after which the 6th Respondent became an employee of the 5th Respondent.

In this regard the Petitioner further elaborated the position as follows: the 6th Respondent had been recruited for a project known as the Graduate Entrepreneurship Loan (GEL) which was being carried on jointly by the governed by the same Directors. Eventually the Petitioner had moved out of this project due to its financial problems and the project had been carried on by the 5th Respondent who consequently:

- b. Paid the 6th Respondent salary;
- c. Paid the 6th Respondent EPF contributions after 31st June 2009 when the 6th Respondent services with it ended, as borne out by **P10** and **P10(A)-(N)**.
- d. Exercised supervision and control over the 6th Respondent as in the case of **Ceylon Mercantile Union v Ceylon Fertilizer Corporation 1985 (1) SLR 401**.
- e. As such, the liability of the 5th Respondent to pay the 6th Respondent gratuity has been set down in the following alternative in paragraph 20 of the petition:
 - i. From the commencement of his employment; or
 - ii. In any case at least from the year 2009 when the 5th Respondent took over the said "Ceylinco Upadhidari Vyaparika Shakthi".

The Respondent's case briefly as follows:

- a) At the inquiry held before the Respondents, no documentary proof whatsoever was submitted by the Petitioner to show that the services of the 6th Respondent with the Petitioner which had commenced on the 31st January 2005 by P8 had ceased by June 2009 and had commenced with the 5th Respondent.
- b) Accordingly, in determining the employer and the period of employment, the r were compelled to act in reliance of the complaint made by the 6th

Respondent dated 14.05.2012 (P11 and the last document marked R1) where he has stated his employment which commenced on 31st January 2005 by P8 ceased with his tendering his resignation to the Petitioner, on 30.06.2010.

- c) In this application the Petitioner has for the first time submitted several documents marked as P10, P10 (a) to (n) upon which have been photocopied Seylan Bank cheques bearing the endorsement "Manager's cheque- GEL" by which it purports to establish that the EPF contribution of all those named in the said document, including the Petitioner had been paid by the same cheque, issued by the 5th Respondent. It is understood that the Petitioner's intention is to draw an inference solely from the issuance of these cheques, that the 5th Respondent was the "employer" of the 6th Respondent.
- d) However, it was contended on behalf of the Respondents that **P10(A)** to **P10(L)** shows that EPF payments have been made under the Petitioner's name and under the Petitioner's EPF registration number. Further, an endorsement contained in the document marked and annexed with the petition as **P10(J)** refers to EPF payments made for "CT&FC staff" (i.e. the staff of the Petitioner).

The fact that EPF contributions had been made by the Petitioner for the entire duration of the 6th Respondent's employment mentioned in the 6th Respondent's complaint (from 1st January 2005 to 30th June 2010) is also confirmed by document marked R5 which comprises the EPF record maintained by the Central Bank in which the Petitioner is named the "employer" and the 6th Respondent the "employee".

It is accordingly submitted that the mere issuance of cheques for EPF dues by the 5th Respondent without more, cannot by itself establish that the 5th Respondent is the "employer" of the 6th Respondent (as well as of all the 4 other employees mentioned therein) for purposes of the Payment of Gratuity Act, particularly in view of the denial of employment by the 5th Respondent. On the contrary, it is submitted that the only possible inference that could be drawn from this material is that there existed some arrangement between the Petitioner and the 5th Respondent by which cheques for the payment of EPF in respect of the staff of the Petitioner had been issued by the 5th Respondent. This inference is supported by the endorsement in **P10(J)** referred to above.

- e) No documentary proof whatsoever was submitted to show that the 6th Respondent's salary was paid by the 5th Respondent from July 2010 onwards.
- f) The case cited by the Petitioner is a case where the court had to decide who the "employer" of the workmen concerned was. The Court considered matters such as payment of wages, supervision and control of work and whether the workmen constituted an integral part of the workforce. In the present case the Petitioner has not submitted any material by which these matters could be determined, in fact as mentioned above, no material has been submitted even in respect of the payment of wages.
- g) Finally, the position taken by the Petitioner in paragraph 20(a) of the petition is totally at variance with its admission that it employed the 6th Respondent by

P8 commencing 31st January 2005. Further, its position in paragraph 20(b) has not been substantiated in any manner. As such, what remains for consideration of Court are the unsubstantiated assertions of the Petitioner.

- h) In these circumstances, it is submitted that the Respondents have decided the matter in issue in conformity with the law and therefore, there is no illegality in issuing P13 as sought to be contended by the Petitioner. In this regard it must be borne in mind that the Payment of Gratuity Act is a piece of social legislation enacted for the benefits of an employee, which should be given full effect as has been done in this case.

At this junction, it will be appropriate to consider the submissions made by 5th Respondent. At the very outset it is observed that there is no relief sought against 5th Respondent.

The 5th Respondent submits that the 6th Respondent at all given time remains as an employee of the Petitioner. On behalf of the Petitioner the 5th Respondent has made the EPF contributions which is marked **P10 (A)–(N)**. It is placed on record that these **P10** were never submitted to the Commissioner of Labour. This is the first time that the Petitioner is submitting these materials to the court and the 1st–4th Respondent.

It is established law that an action cannot be maintained against a party if relief is not prayed for against the said party. This view has been echoed time and time again in various judgments delivered in various jurisdictions. The case of **Surangi v Rodrigo 3 SLR 35**, it was held that “no court is entitled or have jurisdiction to grant relief to a party which are not prayed for in the prayer”. [Emphasis Added]

It is also stated in cases such as **Krishna Priya Ganguly etc v University of Lucknow & Ors. Etc AIR 1984 SC 186** and **Om Prakash & Ors v Ram Kumar & Ors AIR 1991 SC 409** that a party cannot be granted relief if it is not claimed.

The case of **Priya Ganguly etc v University of Lucknow & Ors Etc** states that
“Finally, in his own petition in the High Court, the respondent had merely prayed for a writ directing the state or the college to consider his case for admission yet the High Court went a step further and straightaway issued a Writ of Mandamus directing the college to admit him to the US course and thus granted a relief to the respondent which he himself never prayed for and could not have prayed for. Such a gross discrimination made in the case of a person who had obtained lowest aggregate and lowest position seems to us to be extremely shocking. Although much could be said against the view taken by the High Court yet we would not like to say more than this that the High Court had made a very arbitrary, casual and laconic approach to the case and based its judgment purely on speculation and conjectures...”

In the case of **Bharat Amratlal Kothari v Dosukhan Samadhkhan Sindhi & Ors AIR 2010 SC 475** it has been held that

“Though the court has very wide discretion in granting relief, the court, however, cannot, ignoring and keeping aside the norms and principles governing grant of relief, grant a relief not even prayed for by the Petitioner”

The learned DSG who is appearing for the 1st-4th Respondents take up an objection that the Petitioner is guilty of laches. The Petitioner is seeking to quash the determination marked **P13**. This petition was filed on the 17th of December 2014 that is after more than one year and 4 months. The Petitioner has not explained his delay. This is sufficient to find the Petitioner guilty of laches and refused to entertain the Petitioner but this court takes serious note of this objection and the conduct of the Petitioner.

The question to be determined is whether the 6th Respondent was an employee of the Petitioner. In fact, this question to be asked whether there were sufficient material before the court. It is evident that the Petitioner had never elicited the fact or submitted documents that the 6th Respondent was subsequently "transferred" or "sent" to the 5th Respondent. In fact when the opportunities were given to the Petitioner the Petitioner willingly or accidentally submitted that the 6th Respondent was employed with the "HNB" which is absolutely incorrect.

With the available evidence, the Commissioner of Labour made the determination that the 6th Respondent was the employee of the Petitioner. This fact overwhelmingly confirmed by **P10(A)-(N)** and the submissions by the 5th Respondent.

The Petitioner is seeking a Writ of Certiorari which is a discretionary remedy. Considering the fact that the Petitioner is guilty of laches and the available material supports the decision made by the Commissioner of Labour to file P13 compels this court to refuse to grant a Writ of Certiorari as prayed for by the Petitioner.

Since this matter deals with payment of gratuity this court imposes a nominal cost upon the Petitioner, and I fix the cost as Rs.7500

The court wishes to place its appreciation of the assistance rendered by the counsels.

Application is disallowed with cost.

JUDGE OF THE COURT OF APPEAL

Vijith K. Malalgoda PC J (P/CA)

I agree,

PRESIDENT OF THE COURT OF APPEAL