

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

In the matter of an Application for an Order in the nature of writs of *Certiorari* under and in terms of Article 140 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

Colombo Young Men's Buddhist Association,
70, D.S. Senanayake Mawatha,
Colombo 08.

Petitioner

CA (Writ) Application No. 130/2016 *Vs.*

1. R.M. Amarasinghe Ratnayake,
Assistant Commissioner of Labour,
District Labour Office,
Hambantota.
2. M.D.C. Amarathunga,
Commissioner General of Labour,
Labour Secretariat,
Colombo 05.
3. K.G. Maithripala,
V/1/1, Anderson Flats,
Narahenpita,
Colombo 05.

Respondents

Before : A.L. Shiran Gooneratne J.

Counsel : Saliya Pieris, PC with Ranil Prematilake and Pasindu Thilakaratne for the Petitioner.

Vikum De Abrew, DSG for the Respondents.

Argued on : 23/07/2018

Written Submissions of the Petitioner filed on: 03/09/2018

Written Submissions of the 1st and 2nd Respondents filed on: 09/10/2018

Judgment on : 16/11/2018

A.L. Shiran Gooneratne J.

Colombo Young Men's Buddhist Association (Petitioner), has invoked the jurisdiction of this Court to issue a mandate in the nature of Writ of Certiorari to quash the order/ decision dated 10/11/2014, marked P8, made in terms of Section 46(3) of the Wages Board Ordinance No. 27 of 1941 (Ordinance). The said order states that the Petitioner has failed to pay an overtime payment of a sum of Rupees 825,780.00, for the period of January 2012 to February 2014, in terms of the Wages Board decision to K.G. Maithripala, (3rd Respondent) employed in the "Hotel and Catering Trade" at the Pilgrims Rest in Kataragama. The present application has been preferred mainly on the premise that there is no legal basis to determine that the Petitioner is an entity covered by the "Hotel and Catering Trade" and therefore the impugned order marked P8, is ultra vires and/ or a nullity.

There is no dispute between the parties that the Petitioner is an institution incorporated under and in terms of Ordinance No. 11 of 1927, (as amended) and is declared as an approved charity by the Ceylon Government Gazette No. 10358, dated 22nd February 1952. The 3rd Respondent was employed by the Petitioner as the Resident Manager of the Pilgrims Rest for a period of 1 year, which was renewable each year and was paid a basic monthly salary of Rs. 18,000. In relation to a complaint made by the 3rd Respondent, the Assistant Commissioner of Labour, Hambantota, (1st Respondent) initiated an inquiry for non-payment of overtime, to the 3rd Respondent. Consequent to the said inquiry, the 1st Respondent, by impugned order marked P8 dated 10/11/2014, made in terms of the Wages Board Ordinance, granted the said overtime payment on the basis that the 3rd Respondent was employed in the “Hotel and Catering Trade” at the Pilgrims Rest, Kataragama.

In paragraph 17, the Petitioner contends that the Kataragama Pilgrims Rest is operated by the Petitioner in its capacity as an approved charity and therefore, cannot be classified under a “Trade” covered by “Hotel and Catering Trade” in terms of the Wages Board Ordinance. The Petitioner also contends that the Pilgrims Rest does not cook or sell any food and does not provide bed linen for lower priced rooms. The counsel for the Petitioner has referred to document marked 1R2 tendered by the Respondents, where reference is made to, making and selling food and drink to the “Hotel and Catering Trade”.

In terms of the Ordinance, "Trade" includes any industry, business undertaking, profession, occupation or calling, carried out, performed or exercised by an employer or worker and any branch of or any function or process in any trade. Distinction is made between the employer and the employee of the trade they are engaged in.

This issue was more fully discussed in the case of *Abeygoonsekara Vs. Sinnathamby*, 52 NLR 403, where the Court held that;

"The germ of the idea behind our definition of "trade" is to be found in the case of Skinner v. Jack Breach {(1927) 2 K.B. 220}, where the contention was put forward that both the worker and the employer must be engaged in the same business before that business could be regarded as a trade within the meaning of the Trade Boards Act. This contention was rejected in that case and the Judges took the view that it was immaterial that the employer was engaged in a trade different from that he employs the worker to carry on. Our Legislature adopted this view and gave it legal recognition by enacting the definition of the term "trade" so as to include the occupation or calling of a worker, irrespective of what the trade of the employer may be. In other words, the definition catches up both classes of cases (1) where the employer and the worker are engaged in the same trade and (2) where the employer and the worker may be engaged in two different trades."

It was also observed that “the definition of “trade” in Section 58 of the Wages Board Ordinance includes the occupation or calling of a worker, irrespective of what the trade of the employer may be.”

Therefore, when contending the trade of the Petitioner, the Court should necessarily be mindful to the question as to whether the Resident Manager of the Kataragama Pilgrims Rest falls within the term “Hotel and Catering Trade” in terms of Section 6(1) of the Ordinance, irrespective of the trade the employer belongs to.

As observed above the Petitioner subscribes to the following facts that,

- the Pilgrims Rest does not cook or sell food and does not come under any category which qualifies to be registered as a hotel.
- In terms of the letter of appointment marked P3, the 3rd Respondent is not entitled for overtime payments.
- the 3rd Respondent was a staff grade employee discharging duties as Resident Manager and therefore, in terms of clause 2(ii) of circular dated 15/03/1967, marked 1R2, where “complaints regarding non-payment of overtime by officers of staff rank, the Department will not intervene”.
- in terms of document 1R4, the 1st Respondent is in doubt as to the nature of the trade and/ or asserting the nature of the trade.

The Petitioner by letter dated 19/11/2014, marked P9, sought clarification to the said issues, however, the 1st Respondent failed to respond.

In the case of *Ceylon Petroleum Corporation Vs. Weerakoon and another (1995) ISLR 415*, the Supreme Court looked at whether, a special security force established at the Sapugaskanda installation was within the meaning of the expression “Security Service Trade”, and if so, whether the provisions of part II of the Ordinance which include the requirement to pay overtime would apply. In deciding this issue the Court considered the “qualitative difference” of the special security force from the normal security service trade contemplated by the order made under Section 6(1) of the Ordinance where the security service was instituted for a particular task or assignment.

The Kataragama Pilgrims Rest has been established in 1970, “for a particular task and/ or assignment” namely, to benefit the pilgrims who visit places of worship in Kataragama. Its establishment is in keeping with the objectives of the Petitioner institution. It did not provide the presumed facilities of a hotel or a catering trade is expected to provide. As contended by the Petitioner, the Pilgrims Rest is not registered as a hotel and is not bound by any law and/ or regulation that are applicable in the operation of a hotel/ catering trade in Sri Lanka. Therefore, it is my view that, the trade carried out by the Kataragama Pilgrims Rest and the trade of the 3rd Respondent is characteristically distinct from a trade carried out by the “Hotel and Catering Trade” envisaged in terms of Section 6(1) of the

Ordinance and therefore, there is no legal basis and/ or application to classify the Kataragama Pilgrims Rest or the trade of the 3rd Respondent under “Hotel and Catering Trade” as reflected in the impugned order marked P8 and accordingly, the said order should be quashed.

The Respondents object to this application on the ground of unexplained delay. When this application was supported on 27/04/2016, the Court issued notice on the Respondents and also made interim order staying proceedings in the Magistrate’s Court for a limited period of 1 week. The Court making the said order observed that “there is a matter to be looked into”, in effect a pronouncement by Court that, it can now proceed to hear the facts of the case. Thereafter, when this case was mentioned on several occasions and up to date, the counsel appearing for the Respondents did not object to the extension of the interim order sought for by the Petitioner. It is also observed that the issue of unexplained delay is not taken up as a preliminary objection in the statement of objections filed of record or, new or relevant material produced to Court at the hearing, objecting to the extension of interim order. If the Respondents were seriously contemplating of raising a preliminary objection on undue delay, the Respondents should have raised such issue at the first available opportunity and/ or at several instances the case was mentioned, inter alia, for the extension of interim order. In the circumstances, the question of promptness in filling this Petition is untenable.

For all the above reasons, I allow the Petition and direct the issue of an order in the nature of writ of certiorari to quash document marked P8 as prayed for in paragraph (c) to the prayer. I make no order as to costs.

Petition allowed.

JUDGE OF THE COURT OF APPEAL