

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

In the matter of an Appeal made in terms of Art.154 (P)(6) Read with Art.138 of the constitution of the Democratic Socialist Republic of Sri Lanka.

Case No: CA (PHC) 116/2015

H.C. Chilaw Case No. HCR/33/2013

M.C. Marawila Case No. 27345/C

01. Deputy Commissioner of Labor

Enforcement Branch, Department of Labor,

Colombo 05.

02. The Attorney General's Department,

The Attorney General's Department,
Colombo 12

1st and 2nd Respondents-Appellants

Vs.

02. D.R.S.M.Handalage

Director,

Hunters World (Pvt) Ltd of No:12

Dr.G.L.Peiris Mawatha,

Thudella,Ja-Ela.

2nd Accused Petitioner-Respondent

Before: K.K. Wickremasinghe J.

Janak De Silva J.

Counsel:

Maithee Amerasinghe Jayathilake State Counsel for 1st and 2nd Respondents-Appellants

Dr. Sunil Cooray for 2nd Accused-Petitioner-Respondent

Written Submissions tendered on:

1st and 2nd Respondents-Appellants on 15.08.2018

2nd Accused-Petitioner-Respondent on 22.03.2018 and 03.08.2018

Argued on: 03.07.2018

Decided on: 11.12.2018

Janak De Silva J.

This is an appeal from an order dated 14.07.2015 made by the learned High Court judge of the North Western Province holden in Chilaw.

There are two connected cases bearing No. CA(PHC) 105/2014 and CA(PHC) 112/2015 where parties agreed to be bound by the judgment given in this case. Therefore, while this judgment deals with the facts in CA(PHC) 116/2015, where relevant facts in the other two cases will be referred to.

The 1st Respondent – Appellant (1st Appellant) Deputy Commissioner of Labour (Enforcement Branch) filed a certificate dated 2008.06.04 in the Marawila Magistrates Court in case no. 27345/C in terms of section 8(1) of the Payment of Gratuities Act No 12 of 1983 (as amended). In terms of this certificate, the 1st Appellant sought to recover a sum of Rs 23,660/- from Hunters World Pvt Ltd. This sum allegedly is due as gratuity (plus interest due on such gratuity) to an

employee of Hunters World Pvt Ltd named C. Sudarshi Wasana for the period 18.01.1999 to 31.10.2006.

During the course of proceedings before the Marawila Magistrates Court, it had come to light that the said company had been struck off the register of companies on 05.03.2010 for non-registration under the Companies Act No 7 of 2007. Accordingly, the 1st Appellant had taken steps to add the directors of the said company as respondents for the recovery of the sum stated in the certificate. Upon summons being served on the directors, the 2nd Accused – Petitioner – Respondent (Respondent) who was one of the four directors of Hunters World Pvt Ltd attempted to show cause as to why the said sum of money should not be recovered from him. It was the Respondent's position that he had resigned as a director of the company on 2006.03.23 by submitting a letter of resignation to the company and that therefore he was not liable to pay the said sum of gratuity as that sum fell due after his date of resignation.

In the Magistrates Court, the 1st Appellant took up the position that the Respondent remained as one of the directors of Hunters World Pvt Ltd in terms of the applicable law and records of the Registrar of Companies. The 1st Appellant contended that the matter was governed by the Companies Act No 17 of 1982 (as amended). According to the 1st Appellant, a company was required to submit 'Form – 48' to the Registrar of Companies in terms of section 194(2) of the Companies Act No 17 of 1982 notifying that there had been a change in its directorship. The 1st Appellant contended that a resignation of a company director took legal effect under the Companies Act No 17 of 1982 (as amended) only once this was done. Conversely, the Respondent contended that written notification of the resignation to the company was sufficient to give legal effect to the resignation even in terms of that Act.

The learned Magistrate of Marawila agreed with the submissions made by the 1st Appellant and held that there had been no legally valid resignation by the Respondent and that he remained liable to pay the said sum as gratuity. Being aggrieved by the said order, the Respondent filed a revision application in the Provincial High Court holden in Chilaw.

In the Respondent's revision application (vide pages 49 - 52 of the Appeal Brief) the two main contentions were that;

- a. the learned Magistrate of Marawila had failed to take account of the points of law made by the Respondent in his written submissions viz. that a resignation of a director could take place by written notification sent to the company even under the old Companies Act No. 17 of 1982
- b. in an earlier matter between the same parties for the recovery of arrears due under the Employees Trust Fund Act for the period between February 2007 and April 2007, the High Court of Chilaw (in HCA 33/2009) had come to a finding that the Respondent had ceased to be a director of the company from April 2006. It was argued on this basis that the 1st Appellant – in this matter – was estopped from arguing that the Respondent continued to be a director after this date. (on the basis of *res judicata*)

The learned High Court judge of Chilaw in the present matter accepted the Respondent's argument on *res judicata* and determined that the learned Magistrate of Marawila ought not to have considered the 1st Appellant's contention that the Respondent continued as a director of the company, as the same issue had already been decided against the 1st Appellant in HCA 33/2009. (Vide page 12 of the Appeal Brief)

The present appeal by the 1st Appellant is on the basis that the principle of *res judicata* is inapplicable in determining the question in issue since;

- a. the High Court in HCA 33/2009 which made the finding that the Respondent had ceased to become a director of the company from April 2006 was acting without jurisdiction
- b. the High Court in HCA 33/2009 had only made a pure finding of law regarding the directorship of the respondent and that such pure findings of law do not estop the 1st Appellant from raising issue about the validity of the Respondent's resignation in the present matter

I. The High Court in HCA 33/2009 which made the finding that the Respondent had ceased to become a director of the company from April 2006 was acting without jurisdiction

The Respondent in the present matter relies on the doctrine of *res judicata* to bar the 1st Appellant's claim under the Payment of Gratuities Act. Spencer Bower, Turner and Handley in *The Doctrine of Res Judicata* (3rd Edition, Butterworth 1996) identify the following elements in a successful plea of *res judicata*:

- i. The decision should be judicial in the relevant sense
- ii. It was in fact pronounced
- iii. The tribunal **had jurisdiction over the parties and the subject matter**
- iv. The decision was – final and on the merits
- v. It determined the same question as that determined in the later litigation
- vi. The parties to the later litigation were either parties to the earlier litigation or their privies (Emphasis added)

The 1st Appellant contends that HCA 33/2009 which made a finding regarding the Respondent's resignation from directorship was a decision made without jurisdiction. It is therefore contended that the findings made in that decision cannot be relied on to estop the 1st Appellant – in the present matter – from claiming that the Respondent continues to function as a director.

In *Herath v Attorney General* (60 NLR 193, 223) Basnayake C.J. observed that a judgment or decree of a Court acting without jurisdiction does not operate as *res judicata*.

In the matter before us, the 1st Appellant states that HCA 33/2009 was made without jurisdiction as the High Court lacked jurisdiction to question the Magistrate's order by way of appeal. The Respondent – in his written submissions filed before this court – has conceded that the High Court lacked jurisdiction to determine this matter by way of appeal. This is the correct position in law as held in *Deputy Commissioner of Labour v. Lanka Milk Food (CWE) Limited* [(CA(PHC) APN 299/2003, C.A.M. 02.06.2011)].

The Respondent however contends that the High Court could have determined this matter by way of its revisionary jurisdiction i.e. under Article 154P (3) (b) of the Constitution. It is therefore contended that the High Court's decision should be upheld on the basis that an exercise of a power will be referable to a jurisdiction which confers validity upon it and not to a jurisdiction under which it will be nugatory.

The learned counsel for the Respondent has cited a long line of decisions to support this contention. A perusal of these decisions reveals that this principle has often been relied upon by our courts to preserve the exercise of executive or administrative powers whenever such powers have been exercised with reference to an incorrect jurisdiction/source of power, whilst the correct source of power remained either in the same statute or a different statute. [*Peiris v Commissioner of Inland Revenue* (65 NLR 457); *Leechman and Company Ltd v Rangalla Consolidated Ltd* (1981) 2 Sri LR 373; *Kumaranatunga v Samarasinghe* (1983) 2 Sri LR 63; *Edirisuriya V. Navarathnam* (1985) 1 Sri LR 100; *Manatunga v Baronchihamy* (1995) 1 Sri LR 45].

In contrast, the principle seems to have been applied in a more limited sense when it comes to the exercise of **judicial power** under an incorrect jurisdiction. In *Vander Poorten v Settlement Officer* (48 NLR 361), the Supreme Court sent the matter back to the lower court and made a direction to the District Court to regard a petition under section 24 of the Land Settlement Ordinance as a petition under section 20 of the Waste Land Ordinance. Importantly, the Supreme Court did not – by itself – attempt to regard a petition under one section as a petition under another section. Similarly, in *Ismail v Ismail* (22 NLR 190), the Supreme Court observed that it was open to the District Court to regard an action as an application, when the procedure that should have been followed was the latter. The case was remitted to be dealt with as an application.

Therefore, it is clear that the principle cited by the learned counsel for the Respondent only has limited application in the context of judicial powers being exercised under an incorrect jurisdiction. In such cases, the superior courts will not automatically regard the exercise of judicial powers under an incorrect jurisdiction as having been exercised under the correct source of power/jurisdiction. Accordingly, I am of the opinion that it is not open to this court to

regard HCA 33/2009 as a decision that has been made in terms of the Provincial High Court's revisionary jurisdiction. Therefore, HCA 33/2009 remains a decision that has been made without jurisdiction. Accordingly, I am of the view that the findings made in HCA 33/2009 – regarding the Respondent's date of resignation from his directorship – cannot form the basis for a successful plea of *res judicata* by the Respondent.

In the alternative, it is contended by the Respondent in CA(PHC) 105/2014 that there is issue estoppel. It is not clear whether issue estoppel operates in Sri Lanka in civil cases although the Respondent sought to establish that it does operate in criminal cases in view of *Nalliah v. Herat* (54 NLR 473). However, even if it applies in Sri Lanka the Appellant cannot obtain the benefit of its application as more fully explained below.

The ambit of issue estoppel was considered by Lord Keith in the House of Lords in *Arnold v National Westminster Bank plc* [(1991) 2 AC 93] in a speech with which all the House concurred. He said (at page 105):

"issue may arise where a particular issue forming a necessary ingredient in a cause of action has been litigated and decided and in subsequent proceedings between the same parties involving a different cause of action to which the same issue is relevant one of the parties seeks to re-open that issue."

In *Mills v. Cooper* [(1967) 2 Q.B. 459 at 468] Diplock L.J. exposition of issue estoppel clearly emphasises that it operates only where the particular issue was determined by a court of competent jurisdiction.

As explained above, the judgment in HCA 33/2009 was made without jurisdiction and as such no question of issue estoppel can arise in these proceedings on the validity of the resignation of the Appellant.

Whilst this conclusion would be sufficient to set aside the order of the learned Provincial High Court, the 1st Appellant states that there is a further ground to argue that the principle of *res judicata* is inapplicable in the present matter.

II. *The High Court in HCA 33/2009 only made a pure finding of law regarding the directorship of the Respondent and such pure findings of law do not estop the 1st Appellant from raising issue about the validity of the Respondent's resignation in the present matter*

It has been observed that the principle *res judicata* is generally where the trial of an issue in a later action is barred by the adjudication of that same issue in a previous action. One exception to this general rule is where the issue being tried in a later action is a pure question of law.

Generally, an issue which is a pure question of law can be tried in a later action even if that issue has been adjudicated upon in a previous action. An issue which is a pure question of law cannot be tried in a later action only if the previous action which adjudicated on the pure question of law dealt with the same subject matter as the latter action. This position is reflected in *Jayasinghe v Kiribindu and others* [(1997) 2 Sri LR 1, 76] where it was decided that ***an erroneous decision on a pure question of law will operate as res judicata quoad the subject-matter of the suit in which it is given, and no further.***

In the matter before us, the 1st Appellant contends that the question about the date on which the Respondent's resignation took effect is a pure question of law. According to the 1st Appellant, the fact that the Respondent notified the Registrar of Companies about his resignation from the directorship of the company on 2006.03.23 is never disputed. What is said to be in dispute is whether this written communication amounted to a legally acceptable resignation according to law. According to the 1st Appellant, this is a pure question of law. We are inclined to agree with the submission of the 1st Appellant. Judicial dicta seem to indicate that a mixed question of law is one where an issue of law has arisen in relation to a fact/factual position in regard to which parties are at variance. [*Pure Beverages Ltd. v. Shanil Fernando* (1997) 3 Sri LR 202].

Conversely a pure question of law would be a situation where an issue of law has arisen in relation to a fact/factual position in regard to which parties are **not** at variance. The dispute about the Respondent's valid date of resignation clearly falls into the latter category as it is not the communication of the resignation that is at issue but whether that communication amounted to a legal resignation.

Accordingly, it was open to the learned Magistrate of Marawila to adjudicate on this pure question of law, even though it had already been adjudicated on in HCA 33/2009 as the subject matters of the two actions were different. The subject matter of the present action is the recovery of dues to employees of Hunters World Pvt Ltd under the Payment of Gratuities Act. The subject matter of HCA 33/2009 was the recovery of arrears due under the Employees Trust Fund Act to all employees of Hunters World Pvt Ltd for the period between February 2007 and April 2007. Accordingly, the decision in HCA 33/2009 being a pure question of law would only have been *res judicata* if the present matter also dealt with the recovery of arrears due under the Employees Trust Fund Act to employees of Hunters World Pvt Ltd i.e if the present matter dealt with the same subject matter.

For the foregoing reasons, I am of the opinion that the learned High Court judge of Chilaw erroneously decided that the decision in HCA 33/2009 – regarding the Respondent's date of resignation from directorship – bound the parties in the present matter. The Respondent could not have – in law – relied on the principle of *res judicata* to establish that he had ceased to be a Director of Hunter's World Pvt Ltd from April 2006.

The above findings show that the learned High Court Judge fell into error in setting aside of the judgment of the learned Magistrate of Marawila. However, the Respondent submits that the facts establish that the Respondent did in fact resign as director prior to the period for which the proceedings were instituted in the Magistrates Court of Marawila. This is not a matter which was considered by the learned High Court Judge who went on the basis of *res judicata*. I will now consider whether the Respondent did in fact resign as director before the period material to this application.

During the relevant period, the applicable law was the Companies Act No. 17 of 1982. Section 194(2) of the said Act read:

“The company shall send to the Registrar, within fourteen days from the date of appointment of the first director or that of the secretary of the company, a return in the prescribed form containing the particulars specified in the register referred to in subsection (1) and within fourteen days from the date of any change among its directors or any change of its secretary or in any of the particulars contained in such register a notification in the prescribed form together with, in the case of a change among its directors or a change of its secretary, a letter to the Registrar from each new director or the secretary stating that such director or the secretary has accepted the appointment.”

The Respondent relies on document marked as 2B1 which is a letter dated 05.04.2006 sent by the Appellant to the Registrar of Companies. It states that the Respondent has resigned as a director of the Hunters World (Private) Ltd. and that a letter to that effect has been sent to the Chairman of Hunters World (Private) Ltd. That letter is attached to 2B1. It is dated 23.03.2006 and in the relevant part reads:

“Please permit me to tender my resignation as Director Hunters World (Private) Ltd with immediate effect.”

In my view, this does not establish that the Respondent has ceased to be a director of Hunters World (Private) Ltd. It seeks permission to tender resignation. The Articles Association of Hunters World (Private) Ltd. was not marked in evidence by the Respondent before the Magistrate to enable him to conclude that the above communication resulted in the Respondent ceasing to be a director. Why did the Respondent seek permission to resign if it was possible for him to unilaterally resign as a director? The fact that Hunters World (Private) Ltd. did not send a Form 48 to the Registrar of Companies as required by section 194(2) of the Companies Act No. 17 of 1982 although requested by the Registrar of Companies in writing by 2B2 after the receipt of 2B1 becomes significant in the circumstances of this case.

The burden was on the Respondent to establish that he had ceased to be a director prior to the period of default. I am of the view that he has failed to do so.

For the foregoing reasons, I set aside the order dated 14.07.2015 made by the learned High Court judge of the North Western Province holden in Chilaw.

Accordingly, the appeal is allowed. No costs.

Judge of the Court of Appeal

K.K. Wickremasinghe J.

I agree.

Judge of the Court of Appeal