

**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 in terms of
Article 140 of the Constitution of the
Democratic Socialist Republic of Sri Lanka.

Employees' Trust Fund Board,
1st Floor, Labour Secretariat,
P.O. Box 807, Colombo 05.

Petitioner

C.A. Application

-Vs-

No: Writ 354/2018

01. Minister of Labour and Labour Relations,
Ministry of Labour and Labour Relations,
Labour Secretariat, Colombo 05.

02. Commissioner General of Labour,
Labour Secretariat,
3rd Floor,
Narahenpita,
Colombo 05.

03. Commissioner of Labour,
Labour Secretariat,
7th Floor,
Narahenpita,
Colombo 05.

04. Assistant Commissioner of Labour,
Labour Office – Colombo East,

Department of Labour,
Colombo 05.

05.T. Piyasoma,
No.77, Pannipitiya Road,
Battaramulla.

06.B.G. Priyani,
No.213/39, Balika Niwasa Road,
Rukmale,
Pannipitiya.

Respondents

Before: C.P. Kirtisinghe – J

Mayadunne Corea – J

Counsel: Uditha Egalahewa, PC with Sachinthana Rajamuni for the petitioner

Prinath Fernando for the 6th Respondent

Suranga Wimalasena, SSC for the 1st to 4th Respondents

Argued On: 15.07.2021

Decided on: 16.11.2021

C.P. Kirtisinghe – J

The Petitioner, Employees' Trust Fund Board is seeking for a mandate in the nature of a writ of certiorari to quash the Government Gazette (Extraordinary) bearing No. 2087/78 dated 6th September 2018 and for a mandate in the nature of a writ of certiorari quashing the Government Gazette (Extraordinary) bearing No. 2047/20 dated 28th November 2017 which was amended by the Government Gazette (Extraordinary) No. 2087/78 dated 6th September 2018.

By the Gazette (Extraordinary) No. 2047/20 dated 28th November 2017, the 5th Respondent Arbitrator had decided that the 6th Respondent who was an assistant officer in grade IV of the Petitioner Board should be appointed as an officer of the grade III with effect from 01.10.2001. The 6th Respondent had further ordered that

the appointment to the Grade II which had been granted to her with effect from 01.01.2015 should be back dated to take effect from 01.10.2001. The Arbitrator had also the ordered the Petitioner Board to calculate the pecuniary loss caused to the 6th Respondent and pay it to the 6th Respondent.

By the Government Gazette (Extraordinary) No. 2087/78 dated 6th September 2018, which amended the earlier Gazette Notification No. 2047/20 dated 28.11.2017, the 5th Respondent Arbitrator had decided that the 6th Respondent is entitled to a sum of Rs. 1,428, 260/-.

The facts of the case can be summarized as follows:-

A dispute had arisen between the Petitioner and the 6th Respondent on a promotion which the 6th Respondent was claiming to be entitled. The dispute was whether the 6th Respondent who was working as an assistant officer-grade IV was prejudiced by not being promoted to grade III, at the time of the Internal Promotions of the Petitioner Board and if so, to what reliefs she was entitled.

The 1st Respondent, the Minister of Labour, by virtue of the powers vested in him in terms of Section 4 (1) of the Industrial Disputes Act No. 43 of 1950 as amended, had referred the dispute for settlement by Arbitration and the 5th Respondent was appointed as the Arbitrator. In the meantime, as a result of an appeal made by the 6th Respondent to the relevant authorities, the 6th Respondent was promoted to Grade II with effect from 01.01.2015. Nevertheless, the 5th Respondent decided to proceed with the Arbitration and made his award which was gazetted on 28.11.2017. In the aforesaid award the 5th Respondent held that,

1. The 6th Respondent should have been appointed to a Grade III post with effect from 01.10.2001.
2. The promotion to a post in Grade II awarded by the Petitioner Board on 01.01.2015 shall be backdated to take effect from 01.10.2001.
3. The amount to be paid as compensation to the 6th Respondent shall be calculated by the officers of the Petitioner Board and it should be paid by the Petitioner to the 6th Respondent.

Being aggrieved by the aforesaid award, the Petitioner tendered its Notice of Repudiation to the Commissioner General of Labour on 26.12.2017. On 11.07.2018,

the 3rd Respondent Commissioner of Labour had sought for an interpretation from the arbitrator with regard to the amount awarded to the 6th Respondent for her pecuniary loss. At the aforesaid inquiry before the 5th Respondent, the Attorney-at-Law for the Petitioner had objected to the procedure on the basis that the reference for the interpretation was out of time as an interpretation shall be sought within 1 month of the award in terms of Section 15 of the Industrial Disputes (Hearing and Determination of Proceedings) (Special Provisions) Act No. 13 of 2003 and the 3rd Respondent had sought for the interpretation after a lapse of more than 7 months from the award.

The 5th Respondent had given his interpretation on 27.07.2018 awarding the 6th Respondent the amount mentioned in her Written Submissions.

The learned President's Counsel for the Petitioner submitted that the one month time period stipulated in Section 15 of the Industrial Disputes (Hearing and Determination of Proceedings) (Special Provisions) Act No. 13 of 2003 is mandatory.

Section 15 of the said Act reads as follows:-

15 "A reference under section 34 of the Industrial Disputes Act relating to the interpretation of any award or order made by an arbitrator, Labour Tribunal or the Industrial Court as the case may be, may be made within one month of the date of making of such award or order and it shall be the duty of the arbitrator, Labour Tribunal or Industrial Court as the case may be, to which such reference is being made, to hear and determine such reference within one month of the date of receipt of such reference."

It is the submission of the learned President's Counsel for the Petitioner that even though in that section it is stated that a reference relating to interpretation "may be" made within one month of the date of the award, the words "may be" are used because seeking an interpretation is optional. Therefore, the learned President's Counsel submitted that even though an interpretation "may be" sought if necessary, such reference shall be made within one month of the date of the award. He further submitted that even though the other time periods specified in the said Act may not be mandatory, when a time period is stipulated to take a certain step such as seeking an interpretation within one month from the date of the award, such time periods are mandatory.

On the other hand, the learned Counsel for the 1st, 2nd, 3rd and 4th Respondents submitted that the aforementioned time period is not mandatory. Citing the judgment of **Visuvalingam and Others v Liyanage and Others (1983) 2 Sri L.R. 311**, the learned Counsel submitted that the word “shall” does not make it mandatory. The learned Counsel for the 1st to 4th Respondents addressed Court only on that issue. He informed Court that he is neither supporting nor challenging the main award and the amended award. The learned Counsel for the 6th Respondent submitted that the aforementioned time period is not mandatory.

The learned President’s Counsel submitted that seeking for an interpretation after more than 7 months from the date of the award was out of time and the 5th Respondent’s failure to uphold the Petitioner’s objection regarding same renders the interpretation void *ab initio*.

When an interpretation is gazetted, it is done as an amendment to the gazette relevant to the original award. Therefore, when the interpretation becomes void *ab initio*, the original award which was also amended becomes void *ab initio*.

Without prejudice to the aforementioned submissions the learned President’s Counsel for the Petitioner submitted that by making the aforementioned award dated 28.11.2017, the 5th Respondent had acted clearly outside the scope of instructions given by the 1st Respondent in referring the matter in dispute for settlement by arbitration. Therefore, the award is arbitrary and illegal.

The learned Counsel for the 6th Respondent submitted that 3 persons from the same institution were promoted without passing the interview and one such person had obtained less marks than the 6th Respondent at the examination.

The dispute referred to the 5th Respondent by the Minister, for settlement by arbitration is as follows:-

The matter in dispute between the aforesaid parties is whether Mrs. B.G. Priyani working as Assistant Officer- Grade IV of the Employees’ Trust Fund Board has been caused injustice by not being placed in officer – Grade III post, at the time internal promotions of the institution were made, and if so, to what reliefs she is entitled.

The reference refers to two things,

1. Whether an injustice was caused to the 6th Respondent by not placing her in Grade III
2. at the time internal promotions were made

It refers to a promotion to the grade III and it refers to the time when internal promotions were made. Therefore, the reference anticipates a promotion to Grade III at the time when internal promotions were made (in 2006).

It does not refer to the question whether an injustice was caused to the 6th Respondent by not placing her in grade II.

It does not refer to the question whether an injustice was caused to the 6th Respondent by not placing her in grade III prior to the internal promotions in the institution were made.

At the conclusion of the Arbitration proceedings, the Arbitrator has come to the following conclusion,

කරුණු කෙසේ වුවද, බේරුම්කරණයේ දෙපාර්තමේන්තුව විසින් ඉදිරිපත් කර ඇති කරුණු සැලකිල්ලට ගැනීමේදී ඉල්ලුම්කාරියට පහත සඳහන් පරිදි තනතුර ප්‍රදානයෙන් මෙන්ම මූල්‍යමය හානියක් සිදුවී ඇති බැව් මාගේ පිළිගැනීමයි.

- (i) ඉල්ලුම්කාරිය සේවනියක්වීමෙන් පසු ආරම්භයේ මණ්ඩලයේ IV වන ශ්‍රේණියේ සහකාර නිලධාරියකු ලෙස ස්ථිර පත්වීමක් ලැබී ඇත්තේ 1998.10.01 දින බවත් ඒ අනුව ඇයට 2001.10.01 දිනට III වන ශ්‍රේණියේ නිලධාරී තනතුරට නීත්‍යානුකූලව පත්කළ යුතුව ඇති බවට තීරණය කරමි.
- (ii) ඇය නිලධාරී III ශ්‍රේණිය ලබාගැනීමට අධ්‍යාපන සුදුසුකම් හා සේවා සුදුසුකම් ලබා ඇත.
- (iii) ඉල්ලුම්කාරිය ලිඛිත පරීක්ෂණයකට සහභාගීවී අවශ්‍ය ලකුණු ප්‍රමාණයද ලබාගෙන ඇත. පසු දිනක එනම් 2015.01.01 දින සිට ක්‍රියාත්මක වන පරිදි ඇයට JM-1-1 දෙවන (grade II) ඉහල ශ්‍රේණිය ලැබී ඇත.
- (iv) ඇයට සම්මුඛ පරීක්ෂණයට සහභාගීවීමට නොහැකි වූයේ ඇයගේ පියාගේ මරණින් පසු පවුලේ පිංකමකට අනෙකුත් තැදැයින් සමඟ එක්වීමට සිදුවූ බැවිනි. එහෙත් මේ නිලධාරියා සම්මුඛ පරීක්ෂණයට යාමට නොහැකි වූ බැවින් නිලධාරී III ශ්‍රේණියට යාම සේවා නියුක්තිකයන්ගේ භාර ආරම්භයේ මණ්ඩලය අසාධාරණ ලෙස ප්‍රතික්ෂේප කර ඇත.

- (v) සම්මුඛ පරීක්ෂණයට සහභාගී නොවී ආයතනයේ සේවක අංක 177, එම්. එම්. අනුර කුමාර, සේවක අංක 677 ජේ. එච්. එස්. දිසානායක සහ සේවක අංක 785 ඩී. ඇම්. කේ. ජී. ඒ දසනායක උසස්වීම් ලබා ඇත.

.....ඇයට ගෙවිය යුතු මුදල් ගැන අවබෝධයක්සහ ගණන් බැලීමක් සේවා නියුක්තිකයන්ගේ භාර අරමුදල් මණ්ඩලයේ ඉහල පෙළේ නිලධාරීන්ට ඇතත්, එවැන්නක් දෙවන පාශර්වයේ ලිඛිත දේශනයේ සඳහන් නොවූවද, මුදල් ගෙවීමේදී අනුගමනය කරන චක්‍රලේඛණ විගනණ අදහස් සම්බන්ධයෙන් ඉල්ලුම්කාරියට වඩා ඉහල දැනුමක් සහ පලපුරුද්දක් ඇති මණ්ඩලයේ නිලධාරීන් ලවා ඉල්ලුම්කාරියට ගෙවියයුතු මුදල නිවැරදි ලෙස ගණන් බලා එම මුදල් මෙම ප්‍රදානය සමඟ ආයතනය විසින් ප්‍රදානය කර ඇති 2015.01.01 දිනැති තනතුර 2001.10.01 දිනෙන් පෙර දානමින්ලබාදීමට මෙමප්‍රදානය ශ්‍රී ලංකා ජනරජයේ ගැසට් පත්‍රයේ පලකොට දෙමසක් (මාස 2ක්) ඇතුළත ඩී. ජී. ප්‍රියානි මහත්මියට ගෙවා අවසන් කරන ලෙස හා තනතුරු ප්‍රදානය කරන ලෙසට සේවා නියුක්තිකයන්ගේ භාර අරමුදල් මණ්ඩලයට නියෝග කරමි. මෙම ප්‍රදානය යුක්ති සහගත සහ සාධාරණ බව මගේ නිගමනයයි.

The reference refers to an appointment to a grade III post at the time internal promotions were made. Therefore, the arbitrator was called upon to decide whether an injustice was caused to the 6th Respondent by not being placed in a grade III post at the time internal promotions were made. The arbitrator was not called upon to decide whether an injustice was caused to the 6th Respondent by not being placed in the grade III prior to the time of making internal promotions. The arbitrator was not called upon to decide whether an injustice was caused to the 6th Respondent by not being placed in grade II prior to her elevation to the grade II. But the 5th Respondent arbitrator had come to the conclusion that the 6th Respondent should have been appointed to a grade III post with effect from 01.10.2001 - a date prior to the time of making internal promotions in 2006. He had also come to the conclusion that the 6th Respondent's promotion to a post in grade II awarded by the Petitioner Board on 01.01.2015 should be backdated to take effect from 01.10.2001, a matter which the arbitrator was not called upon to decide.

In coming to the above mentioned conclusions and by making the above mentioned award, the 5th Respondent Arbitrator had acted clearly outside the scope of instructions given by the 1st Respondent in referring the matter in dispute for settlement by arbitration. The Arbitrator had acted clearly outside the mandate given to him.

Therefore, the award of the arbitrator is arbitrary and *ultra vires*.

In the case of **Hatton National Bank Limited Vs Kiran Atapattu and another S.C Appeal No. 38-39/06** decided on 25.06.2013, Saleem Marsoof J held thus:-

“secondly, where there is a valid agreement to refer the dispute for arbitration, but the arbitrators in making their award exceed the scope of the dispute so referred for arbitration, that is, where the resulting award relates to differences beyond the ambit of the mandate of the arbitrators, the award may be set aside or its enforcement may be refused for want of jurisdiction”.

Therefore, a mandate in the nature of a writ of certiorari has to be issued to quash the Government Gazette (Extraordinary) bearing No. 2047/20 dated 28th November 2017 containing the award of the arbitrator and the government Gazette No. 2087/78 dated 6th September 2018 contains the amended award after the interpretation of the original award.

In view of the above conclusion, it will only be an academic exercise to go into the question whether the reference to the arbitrator for an interpretation of the award was out of time and the one month period specified in the Act is mandatory.

For the abovementioned reasons, we issue a mandate in the nature of a writ of certiorari quashing the Government Gazette (Extraordinary) bearing No. 2047/20 dated 28th November 2017 and the Government Gazette (Extraordinary) bearing No. 2087/78 dated 6th September 2018.

Application is allowed.

Judge of the Court of Appeal

Mayadunne Corea – J

I Agree

Judge of the Court of Appeal