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

CA Writ Application No:

0392/2019

In the matter of an Application in the nature of Writ of Certiorari and Mandamus under and in terms of Article 140 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

Lanka Milk Foods (C.W.E) PLC
No. 579/1, Welisara
Ragama

Petitioner

Vs.

1. B.A. Mahinda
   Assistant Commissioner of Labour
   District Labour Office, Ja-Ela

2. Y.M. Thushari,
   Deputy Commissioner of Labour
   District Labour Office, Ja-Ela

3. R.P.A. Wimalaweera,
   Commisssioner General of Labour
   Labour Secretariat,
   No. 41, Kirula Road,
   Colombo 05

4. C.H. Patrick Rienzie Wickramasinghe,
   No. 676/H, Kohalwila Road,
   Dalugama
   Kelaniya

Respondents

Before: M. T. Mohammed Laffar, J.
S. U. B. Karalliyadde, J.

Counsel:

Shiran Coorey instructed by Ms. H.K. Bulathwatta for the Petitioner

M. Jayasinghe SSC for the 1st - 3rd Respondents

Ms. Rochelle Ariyawansa with S. Fernando instructed by Amal Rajapakshe for the 4th Respondent

Argued on: 11.01.2022

Written submissions tendered on: 10.02.2022 by the 4th Respondent

Order delivered on: 05.04.2022

S.U.B. Karalliyadde, J.

This matter was taken up for argument on 11.01.2022 and oral submissions were made on behalf of the parties. Thereafter, the Court permitted the parties to tender their written submissions within one month from the date of the argument. However, only the 4th Respondent has tended his written submission within that period. The Petitioner of this Application, Lanka Milk Food (C.W.E) PLC (hereinafter referred to as the Company) is a public quoted Company. The 4th Respondent joined the Company on 01.10.1999 as an Area Sales Manager and promoted to the post of General Manager, Sales and Distribution with effect from 13.11.2006. He tendered his resignation by letter dated 25.06.2014 marked P-4. Upon his resignation, all statutory dues entitled were paid to him by the Company except the gratuity. By letter dated 09.12.2014 marked P- 15, the 4th Respondent was informed by the Company that in terms of section 13 of the Payment of Gratuity Act, No. 12 of 1983 (as amended) (hereinafter referred to as the Gratuity Act) his gratuity payment had been forfeited for the reason that he had committed/involved in a misappropriation of the fund of the Company. The allegation of the Company was that the 4th Respondent had committed/involved in that illegal act during the period from 01.07.2007 to 31.03.2011, i.e., a period which is more

than 3 years prior to tendering his resignation. The 4th Respondent denied those allegations. Under section 2 of the Industrial Disputes Act, No. 53 of 1973 (as amended) (hereinafter referred to as the Industrial Disputes Act) the 4th Respondent by P-16 (b) made an appeal against the decision of the Company not to pay the gratuity to the Assistant Commissioner of Labour of Ja-ela, the 1st Respondent (hereinafter referred to as the 1st Respondent). With respect of that appeal, the 1st Respondent informed the Company by letter dated 07.05.2015 marked P-17 to deposit Rs. 1,214,500/- with the District Labour Office as gratuity payable to the 4th Respondent. Upon the failure of the Company to deposit that amount, the Deputy Commissioner of Labour, the 2nd Respondent (hereinafter referred to as the 2nd Respondent) issued a Certificate dated 31.03.2018 marked P-23 in terms of Section 8 (1) of the Gratuity Act to the learned Magistrate of Welisara. By the Order dated 19.07.2019, the learned Magistrate refused the application of the Company to reject the Certificate issued by the 2nd Respondent and decided to recover the amount mentioned in the Certificate. By this writ application, the Company seeks to issue a writ of Certiorari to quash the Certificate dated 31.03.2018 issued by the 2nd Respondent and a writ of Mandamus to compel the 1st to 3rd Respondents to conduct a fresh inquiry regarding the claim for gratuity by the 4th Respondent. At the argument, the learned Counsel for the Company drew the attention of the Court to two matters pertaining to this writ application.

1. The Company was never heard by the 2nd Respondent before issuing the Certificate to the Magistrate and no reasons were given by the 2nd Respondent for his conclusion that the Company is liable to pay gratuity to the 4th Respondent. Therefore, the learned Counsel appearing for the Company argued that no proper inquiry was held by the 2nd Respondent.

2. The decision-making power about the question of payment of gratuity is vested with the labour tribunal and not with the Commissioner of Labour and therefore, the decision of the 2nd Respondent is without jurisdiction and therefore, it is illegal. The position of the learned Counsel is that the said jurisdictional objection could not be raised before the 2nd Respondent for the reason that no proper inquiry was held.

The learned SSC appearing for the 1st to 3rd Respondents submitted to the Court that when the 2nd Respondent filed the Certificate in the Magistrate's Court, the learned Magistrate indicated to the parties whether the matter could be resolved and thereafter the parties had further discussions about the dispute. Upon none resolution of the dispute at the administrative level, the matter was referred back to the learned Magistrate. Therefore, the learned SSC argued that the submission of the learned Counsel appearing for the Company that no proper hearing was given to the Company is incorrect. The learned SSC submitted to the Court that upon referring the matter to the learned Magistrate, he issued an enforcement Order on the Certificate and then the Company preferred a revision application to the Provincial High Court of Negombo against that Order and the Provincial High Court dismissed that application. This writ application has been filed before the revision application was dismissed by the High Court. The argument of the learned SSC was that the Company is not entitled to file contemporaries' cases and once the Certificate was issued by the 2nd Respondent, it was incumbent upon the Company to challenge that Certificate by way of a writ. Nevertheless, the Company neglected/defaulted to do so and belatedly filed this writ application. The learned SSC further argued that once the learned Magistrate made his Order, it is a judicial Order and then the Certificate hails into irrelevant and now redundant. Further, that the Certificate issued by the 2nd Respondent has been

superseded by the Order of the learned Magistrate and since the Provincial High Court has affirmed the Order of the learned Magistrate, now that Order is in operation. Therefore, the position of the learned SSC is that the Company is not entitled to raise the jurisdictional objection belatedly in this writ application.

The position of the learned Counsel for the 4th Respondent is that the Company, without challenging the decisions of the Commissioner of Labour containing in the document marked P-17 and the letter marked P-20 sent by the 1st Respondent to the Company confirming the decision mentioned in P-17, the Company wrongfully challenge the Certificate issued by the 2nd Respondent marked P-23. Therefore, the learned Counsel argued that even if the Court quash the decision in the document marked P-23, the determinations of the 1st Respondent on P-17 and P-20 will be in force and in that sense the action of the Company will be futile.

In this writ application, the Company challenge the Certificate issued by the 2nd Respondent dated 31.03.2018 marked P-23 on the basis that the 2nd Respondent has no jurisdiction to consider the decision of the Company for forfeiting the gratuity of the 4th Respondent and that power is vested with the labour tribunal. In addition to that, before taking the decision that the Company is liable to pay the gratuity to the 4th Respondent, the Company was not heard and therefore, no proper inquiry has been held by the 2nd Respondent.

The section 13 of the Gratuity Act provides thus;

"*Any workman to whom a gratuity is payable under Part II of this Act and whose services have been terminated for reasons of fraud, misappropriation of funds of the employer, willful damage to property of the employer, or causing the loss of goods,*

articles or property of the employer, shall forfeit such gratuity to the extent of the damage or loss caused by him."

Based on section 31 B (1) (b) and (c) of the Industrial Disputes Act, the learned Counsel for the Company argued that the decision-making power about the question of payment of gratitude is vested with the labour tribunal and not with the Labour Commissioner.

Section 31 B (1) (b) and (c) provides thus;

"31B. (1) A workman or a trade union on behalf of a workman who is a member of that union, may make an application in writing to a labour tribunal for relief or redress in respect of any of the following matters: -

(b) the question whether any gratuity or other benefits are due to him from his employer on termination of his services and the amount of such gratuity and the nature and extent of any such benefits, where such workman has been employed in any industry employing less than fifteen workmen or any date during the period of twelve months preceding the termination of the services of the workman who makes the application or in respect of whom the application is made to the tribunal;

(c) the question whether the forfeiture of a gratuity in terms of the Payment of Gratuity Act, No. 12 of 1983 has been correctly made in terms of that Act; …"

As per section 31 B of the Industrial Disputes Act, the labour tribunal has the jurisdiction to determine the question of the correctness of a decision to forfeit the payment of gratuity. In terms of section 13 of the Gratuity Act, an employer could forfeit the gratuity of an employee only where the employee's services have been terminated for the reason of fraud, misappropriation of funds of the employer, willful damage to property of the employer, or causing the loss of goods, articles or property of the employer. However, the Company has not terminated the service of the 4th

Respondent for any of the aforementioned reasons. In fact, the 4th Respondent has himself resigned and the Company has accepted his resignation and EPF contribution also have been paid.

In contrast to the aforementioned legal provisions, Section 5 (1) of the Gratuity Act provides thus;

"Every employer who employs or has employed fifteen or more workmen on any day during the period of twelve months immediately preceding the termination of the services of a workman in any industry shall, on termination (whether by the employer or workman, or on retirement or by the death of the workman, or by operation of law, or otherwise) of the services at any time after the coming into operation of this Act, of a workman who has a period of service of not less than five completed years under that employer, pay to that workman in respect of such services, and where the termination is by the death of that workman, to his heirs, a gratuity computed in accordance with the provisions of this Part within a period of thirty days of such termination."

Sections 8 (1) and (2) of the same Act proved that;

"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 subsection (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 for 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 or not punishable with imprisonment and the provisions of subsection (1) of section 291 (except paragraph (a), (d) and (i) thereof) of the Code of Criminal Procedure Act, No. 15 of 1979, relating to default of payment of a fine imposed for such an offence shall thereupon apply and the Magistrate may make any decision which by the provisions of that subsection, he could have made at the time of imposing such sentence.

(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."

Hence, by virtue of sections 5 and 8 of the Gratuity Act, the Commissioner of Labour is vested with jurisdiction to inquire into and issue a Certificate when an employer is in default of paying gratuity to its employees. In the case of *Baur and Co Ltd Vs Commissioner General of Labour*[1] Justice Sriskandarajah held as follows;

"Therefore, as contemplated by Section 31 B (c) only the correctness of the forfeiture can be canvassed in the labour tribunal. As the termination of the employment of the 3rd Respondent is not on the grounds contemplated in Section 13 of the Gratuity Act, the Commissioner of Labour is entitled to recover the gratuity payment under section 5 read with section 8 of the Gratuity Act on the basis that the forfeiture of the gratuity of the 3rd Respondent under Section 13 of the said Act is a nullity."

In the instant writ application, the 4th Respondent tendered his resignation by letter dated 15.06.2014 marked P-4. That letter has been accepted by the Company. Section 2 (1) (a) of the Termination of Employment of Workmen (Special Provisions) Act, No.

[1] C. A. No:1033/2005.

4 of 1976 (as amended) provides that; "*No employer shall terminate the scheduled employment of any workmen without the prior consent in writing of the workman*." In the instant application, the Company neither accepted nor refused to accept the resignation of the 4th Respondent in writing. Nevertheless, upon tendering the resignation by P-4, the Company has paid the EPF contribution to the 4th Respondent. Therefore, it can be concluded that the resignation of the 4th Respondent has been accepted by the Company.

The position of the Company is that the reason for forfeiture of gratuity of the 4th Respondent is that he had committed and/or involved in a misappropriation of funds of the Company. The Company alleges that the misappropriation had taken place during the period from 01.07.2007 to 31.03.2011. The 4th Respondent has tendered his resignation on 25.06.2014. Therefore, it is clear that the Company has decided to forfeit the gratuity of the 4th Respondent in respect of an alleged misappropriation which was taken place well over 3 years prior to tendering of the resignation by the 4th Respondent. There is no evidence before the Court that during that period any legal/disciplinary action has been taken against the 4th Respondent in respect of the alleged misappropriation of funds which amounts to Rs. 1,593,850/84. On the other hand, if the 4th Respondent had involved in misappropriation of money of the Company, it should have refused to accept the resignation of the 4th Respondent and should have terminated his services without paying him the EPF Contributions. Under the above stated circumstances, the Court can be satisfied that the Company has arbitrary decided to forfeit the gratuity of the 4th Respondent merely on a suspicion that he had committed and/or involved in misappropriation of funds of the Company. It is important to mention that there is no material before the Court that when making the decision to forfeit the gratuity, an opportunity was given to the 4th Respondent to present his facts. When

considering all the above stated facts and circumstances, the Court can conclude that the decision said to have been taken in terms of section 13 of the Gratuity Act by the Company, is illegal and ultra vires.

The learned Counsel appearing for the Company argued that the Company has never been heard by the Commissioner of Labour regarding the application of the 4th Respondent for payment of gratuity and therefore, no- proper inquiry has been held. By the letter dated 15.12.2014 marked P-16 (a), the 1st Respondent has informed the Company that he is conducting an inquiry on 29.11.2014 in respect of the complaint made by the 4th Respondent and adduce evidence if any at the inquiry. After the inquiry was held, the 1st Respondent by letter dated 07.05.2015 marked P-17 has informed the Company to deposit Rs. 1,214,500/- (gratuity and the penalty thereto) to be paid to the 4th Respondent. The Company, by letter dated 14.05.2015 marked P-18 has requested from the 1st Respondent to reconsider the decision contained in P-17. In P-18 the Company has admitted that at the inquiry held before the 1st Respondent, an opportunity had been given to the Company to present its facts and accordingly, on behalf of the Company the facts had been presented. Therefore, it is clear that the submission of the learned Counsel for the Company that the Company was never heard is incorrect. It is evident from the letter marked P-19 that the 1st Respondent had taken steps to conduct another inquiry in pursuant to a request made on behalf of the Company on P-18. By P-19 the Company had been informed by the 1st Respondent to present all evidence at the inquiry and after a fresh inquiry was held, the 1st Respondent has informed the Company by letter dated 29.03.2017 marked P-20 that it is liable to pay the sum mentioned in P-17. Responding to that letter, the Company has sent the letter dated 11.04.2017 marked P-21 to the 1st Respondent retreating the facts stated in its earlier letter marked P-18 that the Company is not liable to pay gratuity to the 4th Respondent

in terms of section 13 of the Gratuity Act. In P-21 the Company has stated that the 1st Respondent has misunderstood the facts presented on behalf of the Company at the inquiry. When considering all the above stated facts, it is clear that the Company has given opportunities to present its facts at the inquiries held by the 1st Respondent on behalf of the Commissioner of Labour and it has presented its facts at the inquiries. Therefore, the Court cannot accept the submissions of the learned Counsel for the Company that the Company was never heard. Under such circumstances the Court can come to the conclusion that the Company has misrepresented and suppressed the material facts and therefore, is not entitled to invoke the discretionary powers of this Court.

It is established law that the court could refuse to exercise its discretionary powers without going into the merits of the application, if there has been suppression and/or misrepresentation of material facts. It is relevant to refer to the following portion of the judgment of Justice Pathirana in W. S. *Alphonso Appuhamy v. Hettiarachchi*[2],

"The necessity of a full and fair disclosure of all the material facts to be placed before the Court when, an application for a writ is made and the process of the Court is invoked is laid down in the case of the King v. The General Commissioner for the Purpose of the Income Tax Acts for the District of Kensington-Ex-parte Princess Edmorbd de Poigns. Although this case deals with a writ of prohibition, the principles enunciated are applicable to all cases of writs or injunctions. In this case a Divisional Court without dealing with the merits of the case discharged the rule on the ground that the applicant had suppressed or misrepresented the facts material to her application. The Court of Appeal affirmed the decision of the Divisional Court that

[2] 77 N.L.R. 131 at 135.

there had been a suppression of material facts by the applicant in her affidavit and therefore it was justified in refusing a writ of prohibition without going into the merits of the case. In other words, so rigorous is the necessity for a full and truthful disclosure of all material facts that the Court would not go into the merits of the application, but will dismiss it without further examination".

The aforementioned finding of Justice Pathirana has been followed in many cases.[3] Furthermore, in the case of *Sarath Hulangamuwa Vs Siriwardena, Principal, Vishaka Vidyalaya*[4] and others, it was held that,

"Petitioner who seeks relief by writ which is an extraordinary remedy must in fairness to this court, bare every material fact so that the discretion of this court is not wrongly invoked or exercised."

Considering all the above stated facts and circumstances, I dismiss the Application of the Company. The Company should pay Rs. 75,000/= to the 1st to 4th Respondent as costs of this Application.

JUDGE OF THE COURT OF APPEAL

M.T. MOHAMMED LAFFAR, J.
I agree.

JUDGE OF THE COURT OF APPEAL

[3] *Blanca Diamonds (Pvt) Ltd Vs Wilfred Van Els And Two Others* (1997) 1 Sri LR 360, *Laub Vs Attorney General And Another* (1995) 2 Sri LR 88, *W.A Bhathiya Indika Wickramasinghe Vs Land Commissioner General & Others* CA (Writ) 381/2017.
[4] (1986) 1 SLR 275 at 282.