

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

In the matter of an Application for a Writ  
of *Certiorari* under Article 140 of the  
Constitution of the Democratic Socialist  
Republic of Sri Lanka.

**Court of Appeal Case No.**

**CA/WRT/0451/2013**

Seylan Bank  
90, Galle Road,  
Colombo 03.

**Petitioner**

**Vs**

1. Hon. Gamini Lokuge,  
Minister of Labour,  
Labour Secretariat,  
575, Colombo 05.
2. V. B. P. K. Weerasinghe,  
Commissioner General of Labour,  
Labour Secretariat,  
575, Colombo 05.
3. L. T. G. D. Dharshana,  
Assistant Commissioner of Labour  
(Colombo East),  
Labour Secretariat,

575, Colombo 05.

4. C. Kotigala,  
42/17A, Judges Scheme,  
Beddagana Road,  
Kotte.
5. Hon. S. B. Navinna,  
Minister of Labour,  
Labour Secretariat,  
575, Colombo 05.
6. Herath Yapa,  
Commissioner General of Labour,  
Labour Secretariat,  
575, Colombo 05.
7. Hon. W. D. J. Seneviratne,  
Minister of Labour,  
Labour Secretariat,  
575, Colombo 05.
8. Mrs. Chandani Amaratunga,  
Commissioner General of Labour,  
Labour Secretariat,  
575, Colombo 05.
9. Hon. Raveendra Samaraweera,  
Minister of Labour,  
Labour Secretariat,  
575, Colombo 05.
10. R. P. A. Wimalaweera,  
Commissioner General of Labour,  
Labour Secretariat,  
575, Colombo 05.
11. Hon. Manusha Nanayakkara,  
Minister of Labour,

Labour Secretariat,  
575, Colombo 05.

12. Commissioner General of Labour,  
Labour Secretariat,  
575, Colombo 05.

**Respondents**

Before: **M. T. MOHAMMED LAFFAR, J.**

Counsel: Chandimal Mendis for the Petitioner.  
A. Rajapakse for the 4<sup>th</sup> Respondent.  
Suranga Wimalasena DSG. for the State.

Written Submissions on: 16.10.2019 by the Petitioner  
30.07.2020 by the 1<sup>st</sup> to 3<sup>rd</sup> Respondent.

Decided on: 01.03.2023

**MOHAMMED LAFFAR, J.**

The Petitioner Bank is seeking a mandate in the nature of a Writ of *Certiorari* to quash the decision of the 3<sup>rd</sup> Respondent, the Assistant Commissioner of Labour, which is marked as P18, directing the Petitioner to pay a sum of Rs. 665,625/- to the 4<sup>th</sup> Respondent as a surcharge.

When the matter was taken for argument on 17-11-2022, the learned Counsel for the Petitioner, the learned Counsel for the 4<sup>th</sup> Respondent and the learned Deputy Solicitor General appearing for the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents consented to dispose of the argument by way of written submissions that have already been tendered.

**Factual matrix:**

The 4<sup>th</sup> Respondent had joined the Petitioner Bank as a Manager on 01-03-1995 and thereafter, was elevated to the post of Director and had been serving in the Petitioner Bank from 01-03-1995 to 29-12-2010 until his resignation on 23-08-2011. Thereupon, at the request of the 4<sup>th</sup> Respondent, the Petitioner paid a sum of Rs. 14,920,688/- to the 4<sup>th</sup> Respondent as terminal benefits.

The 4<sup>th</sup> Respondent, by letter dated 17-09-2011 had made a complaint to the 2<sup>nd</sup> Respondent (Commissioner General of Labour) seeking the encashment of accumulated leave, terminal benefits which were paid in September 2011, a 50% surcharge, entitled salary and other emoluments up to the age of 55 years (P15). An inquiry was conducted and both parties tendered their respective written submissions. On 11-07-2013, the 3<sup>rd</sup> Respondent issued a certificate directing the Petitioner Bank to make a payment as surcharge in an amount of Rs. 665,625/- (P18), the Petitioner is now challenging the said certificate on the grounds *inter-alia* as set out below;

1. The 3<sup>rd</sup> Respondent has failed to consider the fact that the 4<sup>th</sup> Respondent was the Principal Legal Officer of the Petitioner Bank at the time of his retirement and that he failed to advise the Petitioner Bank to pay the gratuity on time.
2. The 3<sup>rd</sup> Respondent has failed to appreciate the fact that the 4<sup>th</sup> Respondent has obtained over Rs. 14 million as terminal benefits from the Petitioner Bank without any protest including a payment of Rs. 1,000,000/- as *an ex-gratia* payment.

3. The 3<sup>rd</sup> Respondent failed to consider the fact that the 4<sup>th</sup> Respondent was a Director at the time the Petitioner Bank faced financial crisis, and was directly responsible for the day-to-day operations of the Petitioner Bank and its financial viability.
4. The decision of the 3<sup>rd</sup> Respondent is not just and equitable Order and is ultra-vires of the power vested in him.

Admittedly, the 4<sup>th</sup> Respondent was entitled to gratuity for the period between 01-03-1995 to 30-12-2010, and whereas the said gratuity was paid by the Petitioner Bank to the 4<sup>th</sup> Respondent around September 2011. As such, as the Petitioner failed to pay the full amount of gratuity due to the 4<sup>th</sup> Respondent within the period prescribed in section 5 (1) of the Payment of Gratuity Act, No.12 of 1983, after inquiry, the 3<sup>rd</sup> Respondent in terms of section 5 (4) of the said Act, delivered the Order marked as P18, directing the Petitioner Bank to pay a surcharge of Rs. 665,625/- to the 4<sup>th</sup> Respondent for the delay in payment.

Section 5 (1) and (4) reads thus;

*“(1) 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.*

*(4) Any employer who, being liable to pay any sum due as gratuity to a workman or his heirs, as the case may be, under subsection' (1), fails or defaults to pay that sum, on or before the due date, he shall be liable to pay to that workman or his heirs, as the case may be, in addition to the sum due as the gratuity, a surcharge on that sum calculated in the following manner:-*

*(a) where the payment of the gratuity has been in arrears for a period not exceeding one month from the due date, a surcharge of ten per centum of the sum due as gratuity;*

*(b) where the payment of the gratuity has been in arrears for a period exceeding one month but not exceeding three months from the due date, a surcharge of fifteen per centum of the sum due as gratuity;*

*(c) where the payment of the gratuity has been in arrears for a period exceeding three months but not exceeding six months from the due date, a surcharge of twenty per centum of the sum due as gratuity;*

*(d) where the payment of the gratuity has been in arrears for a period exceeding six months but not exceeding twelve months from the due date a surcharge of twenty-five per centum of the sum due as gratuity;*

*(e) where the payment of the gratuity has been in arrears for a period exceeding twelve months from the due date, a surcharge of thirty per centum of the sum due as gratuity.”*

In this respect, it is abundantly clear that the Order made by the 3<sup>rd</sup> Respondent marked as P18 is within the purview of sections 5 (1) and 5 (4) of the said Act.

The Petitioner is a legal person, being the employer of the 4<sup>th</sup> Respondent in respect of the relevant period of time, it is the statutory liability of the Petitioner Bank to pay the gratuity to the 4<sup>th</sup> Respondent in terms of the Act. The contention of the learned Counsel for the Petitioner that the 4<sup>th</sup> Respondent, being the Chief Legal Officer of the Petitioner Bank failed to advise the Bank to make the payment on time is baseless, devoid of merits and misconceived in law. In terms of the Act, the liability is vested with the employer and not with each and every individual to take steps to make the payment of gratuity to relevant employees.

It is the contention of the Petitioner that the 4<sup>th</sup> Respondent had accepted the gratuity on 10-09-2011 without any protest and therefore, now cannot complain about the delay. There is no agreement between the Petitioner and the 4<sup>th</sup> Respondent that the latter will forego the surcharge due to the delay in making of the payment. It is pertinent to be noted that, under section 10 (1) of the

Act, even with an agreement, which is less favorable to the workman, the employer is not permitted to implement such an agreement, which reads thus;

*10 (1) "Where the gratuity payable to a workman is governed by a collective agreement, award of an Industrial Court or arbitrator under the Industrial Disputes Act or any other agreement, the computation of such gratuity in respect of his services shall be made in accordance with the terms of such collective agreement, award of an Industrial Court or arbitrator or other agreement as the case may be, provided that the gratuity or terminal benefits set out therein are more favourable to the workman than the gratuity payable under this Act."*

In this scenario, the Petitioner cannot now take up the position that the acceptance of the gratuity by the 4<sup>th</sup> Respondent on a later date estops the 4<sup>th</sup> Respondent from agitating his statutory rights.

In a nutshell, admittedly, the 4<sup>th</sup> Respondent is entitled to the gratuity for the said period and whereas the Petitioner Bank failed to pay the same to the former on time. In the instant Application the Petitioner does not challenge the computation of the surcharge in the document marked P18. Hence, it is manifestly clear that there is a breach of statutory duty by the Petitioner. Failing to make the statutory payments by the employer to the employees is illegal. The principle of illegality is a fundamental aspect of administrative law that governs the actions of administrative agencies and other public bodies. It refers to the idea that an administrative action that is contrary to the law, or otherwise illegal, can be challenged and set aside by Courts.

The principle of illegality is closely tied to the concept of procedural fairness, which requires that administrative decisions be made in a fair and impartial manner. If an administrative action is found to be procedurally unfair, it may also be considered illegal and subject to review by Courts.

Where a statute gives a public authority power to perform an action and the public authority acts outside its jurisdiction, its action becomes illegal. Therefore, in such instances the court may declare its action as *ultra vires* by reason of it being illegal. Innes CJ in the South African Supreme Court case of **Johannesburg Consolidated**

**Investment Co Vs. Johannesburg Town Council 1903 TS 111 at 115**, enunciated that;

*“Whenever a public body has a duty imposed upon it by statute, and disregards important provisions of the statute, or is guilty of gross irregularity or clear illegality in the performance of the duty, this Court may be asked to review the proceedings complained of and set aside or correct them.”*

In this scenario, the decision marked as P18 is within the purview of the Payment of Gratuity Act, No.12 of 1983, and therefore, the grounds upon which the impugned decision is being challenged are devoid of merits and misconceived in law. Thus, the Application is dismissed. I make no order as to costs.

*Application dismissed.*

**JUDGE OF THE COURT OF APPEAL**