

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

*In the matter of an Application for mandates
in the nature of a Writ of Certiorari and
Prohibition under and in terms of Article
140 of the Constitution of the Democratic
Socialist Republic of Sri Lanka.*

CA/WRIT/280/2022

Sri Lankan Airlines Ltd.
Airline Centre, Bandaranaike
International Airport,
Katunayake.

PETITIONER

Vs.

1. Commissioner General of Labour
Department of Labour,
No.41, Kirula Road,
Colombo 05.
2. P.A.S.C. Pathiraja
Assistant Commissioner of Labour,
District Labour Office,
Negombo.
3. D.M.R. Bandara
Labour Officer,
District Labour Office,
Negombo.
4. Flight Attendants' Union
(TU Registration No.6350)
No. 69/5B,
Elvitigala Mawatha
Colombo 08.

RESPONDENTS

Before : Sobhitha Rajakaruna J.
Dhammika Ganepola J.

Counsel: Palitha Kumarasinghe, PC with Chathurika Gunasekara for the Petitioner
Yuresha Fernando, DSG with Abigail Jayakody, SC for the 1st to 3rd
Respondents
S.H.A. Mohamed with Pramod Polpitiya for the 4th Respondent

Written submissions: Petitioner - 15.06.2023
1st to 3rd Respondents - 17.07.2023
4th Respondent - 20.06.2023

Decided on: 28.07.2023

Sobhitha Rajakaruna J.

The main question which needs resolution by this Court in the instant Application is whether the cabin crew employees employed by the Petitioner Company (Sri Lankan Airlines Limited) in Grades 'C' and 'C1' are entitled to receive the budgetary relief allowance in terms of the provisions of the Budgetary Relief Allowance of Workers Act No. 4 of 2016 ('Act').

The Petitioner is primarily seeking a writ of certiorari quashing the Notice dated 25.05.2022, marked 'I', issued by the 2nd Respondent (Assistant Commissioner of Labour) and/or the Notice dated 02.06.2022, marked 'J4', by which the Petitioner was purportedly held liable for defaulting payment of budgetary relief allowances under the said Act by the said 2nd Respondent. By virtue of the said Notice 'J4' the Petitioner has been ordered to deposit a sum amounting to over Rs. 37 Million. The Petitioner claims that it is a company owned by the Government of Sri Lanka and it is exempt from paying budgetary relief allowances to the workers under the said Act.

By virtue of Section 3 of the said Act, every employer in any industry or service should pay with effect from May 1, 2015 to every worker employed by such employer a budgetary relief allowance calculated on the basis mentioned therein. The said Act itself provides which industry, business or undertaking should be excluded from paying budgetary relief allowances to their employees/ workers. The exclusion of such entities from paying the said allowances is provided in the interpretation given to the words 'industry or service' in Section 14 of the said Act.

Section 14 -

“industry or service” includes–

- (a) any trade, business, manufacture and agriculture, any undertaking or occupation by way of trade, business, manufacture or agriculture and any branch or section of trade, business, manufacture or agriculture;
- (b) work or labour of any description whatsoever performed by persons in the employment of a local authority, or of a corporation established by or under any written law for carrying on an undertaking whether for purposes of trade or otherwise;
- (c) every occupation, calling or service of workers, and
- (d) every undertaking of employers,

but does not include any industry, business or undertaking which is carried on by any corporation, board or other body which was or is established by or under any written law where the Government holds a majority of the share capital with funds or capital wholly or partly provided by the Government by way of grant, loan or otherwise; or any registered society within the meaning of the Co-operative Societies Law, No. 5 of 1972. (Emphasis Added)

In *Hotels Colombo (1963) Limited (Grand Oriental Hotel) v R.P.A. Wimalaweera, The Commissioner General of Labour and others (2020) CA Writ 47/2019 decided on 04.09.2020*, His Lordship Justice Arjuna Obeyesekere considering the definition given to the words 'industry or service' in the English and Sinhala texts has identified that the following

requirements must be satisfied by the Petitioner¹ if it is to be excluded from the definition of 'industry or service', and thereby not be liable for the payment of the said allowance:

- a) *The industry, business or undertaking must be carried out by any corporation, board or other body which was or is established by or under any written law;*
- b) *The Government must hold a majority of the share capital in the said industry, business or undertaking with funds or capital wholly or partly provided by the Government by way of grant, loan or otherwise"*

According to the precedents enunciated² in the said case, both requirements above should be satisfied for a corporation, board or other body to be excluded from the liability of paying budgetary relief allowances under the said Act. The Petitioner Company claims that it is not liable to pay budgetary relief allowances to cabin crew employees in Grades 'C' and 'C1' as it is incorporated under the Companies Act and the Government holds the majority of shares of the Company. The 4th Respondent taking a contrasting view, asserts that the Petitioner Company has not been duly established by a specific law. The contention of the 4th Respondent is that only the entities such as the Press Complaints Commission of Sri Lanka, Telecommunications Regulatory Commission of Sri Lanka, Employees' Trust Fund, Mahaweli Authority of Sri Lanka, which are established by a specific Act of Parliament are deemed to be exempt from the application of the said Act and that companies registered under the Companies Act cannot be considered for such exceptions.

Firstly, this Court needs to examine whether the Petitioner Company comes within the abovementioned category of institutions in which the Government holds a majority of the share capital. Certification of Incorporation marked 'A1(b)' has been issued by the Registrar General of Companies in order to certify that the Petitioner is registered as a limited company as if it was incorporated under the Companies Act No. 07 of 2007. It is described in paragraph 9 of the Petition of the Petitioner, that the Government of Sri Lanka owns, through the Secretary to the Treasury, 99.52% of the total shares of Sri Lankan Airlines Limited. In proof of the breakdown of such share capital, the Petitioner has

¹ Hotels Colombo Limited (Grand Oriental Hotel)

² I am aware that the Supreme Court has refused special leave in Special Leave to Appeal Application bearing case No.SA/SPL/LA/2017/2020 filed against the said Writ Application bearing No. 47/2019 on 11.11.2021.

annexed a document to that effect marked 'B'. The 4th Respondent in its' statement of objections responding to the averments in the said paragraph 9 has admitted that the overwhelming majority of the shares of the Petitioner are held by the Government of Sri Lanka. The 1st to 3rd Respondents in their statement of objections have not denied categorically the said averments relating to the majority shareholding of the Petitioner Company by the Government of Sri Lanka.

In light of the above, it is clear that the Government is holding a majority of the share capital of Sri Lankan Airlines Limited with funds or capital provided by the Government. One of the main arguments raised in the said *Grand Oriental Hotel Case* was that the majority of the shares of the Grand Oriental Hotel were owned by the Bank of Ceylon, which is a State-owned bank and thus, the Grand Oriental Hotel should be exempted from the liability of paying budgetary relief allowances. Anyhow, the Court of Appeal appears to have taken a view that the exclusion under the said Act cannot be extended to entities where shares are not directly held by the Government. Accordingly, the final conclusion of the said *Grand Oriental Hotel Case* cannot affect the findings of this Court in the instant Application as the Government directly holds the majority of shares of the Petitioner Company. Thus, it appears that the Petitioner has met one of the above requirements to be excluded from making budgetary relief allowances, on the basis of ownership of majority of shares.

Now I advert to the other requirement which a corporation, board or other body must satisfy in order to be exempted from liability under the provisions of the said Act. Such requirement deals with the mode of establishment of the entity which seeks exclusion. When you sift the said requirement, one may find three sub limbs: a corporation, board or other body should be in existence; such corporation, board or other body should be established by or under any written law; and also, the said corporation, board or other body should carry out an industry, business or undertaking.

When examining the fact whether the Petitioner Company has met the said requirement, the mode of the establishment of the said Company should be taken into consideration carefully. Out of those three sub-limbs mentioned above, what attracts me mostly is the element which includes the word 'established'. In other words, the corporation, board or other body stipulated in the said section should be **established** by or under any written law and it is specifically not to be **incorporated** by or under any written law. At once, one may

argue that there is no difference between the words 'established' and 'incorporated'. But it seems that there should be a difference between these two words depending on the context in which it is used and also on the specific intention of the Legislature.

Once an entity is incorporated by or under a written law, such entity would not get the juristic personality by mere enactment of such written law but a special provision should be embodied therein by Parliament for such an entity to be considered a juristic person with perpetual succession. However, to my mind, the establishment of an entity is generally to give effect to commencing or establishing such entity (including a corporation, board or other body) and to prove the same. Similarly, the date of establishment may refer to the date on which a business starts its' operations, whilst the date of incorporation can be the date on which a business acquires the legal foundation to carry out its' operations. In that sense, there should be a difference between an incorporated business and a registered business as well. It appears, *prima facie*, that a registered business is attached to persons who own such business or its' directors to the extent of bearing the risk of liability, particularly in limited liability companies. Shareholders or owners of a business which is incorporated may not bear such risk of the business personally.

The status of a statutory corporation and an unincorporated body is also important in order to understand the above differences. 'Only if the functions of a proposed body are such that corporate status is necessary, should that status be given. If the body is to engage in commercial activity, or be self-financing, or is to hold funds or other property, or is to enter into contracts, there is likely to be a need for corporate status. If a body is to be solely advisory or judicial or quasi-judicial, there is unlikely to be a need for incorporation.' (Vide- G. C. Thornton, *'Legislative Drafting'*, 3rd ed., 1987, London Butterworths, 205)

In this backdrop, this Court needs to consider whether the Petitioner, which is a company incorporated under the Companies Act No.7 of 2007 ('Companies Act'), comes within the definition of 'a body established by or under any written law'. The Petitioner referring to the interpretation given to the words "written law" in Article 170 of the Constitution, contends that the requirement of establishment by or under any written law would be fulfilled once a certificate of registration is issued under the Companies Act. I am not inclined to accept the way in which the said argument was formulated by the Petitioner at the hearing stage. The fundamental reason that can be assigned to my view is that the Petitioner Company cannot be considered a statutory body or a corporation created by a

statute merely because it has been incorporated by or under the Companies Act. In this sense I agree to a certain extent to the argument of the 4th Respondent that the Companies Act cannot be considered a specific law which incorporates or establishes a particular corporation, board or body.

The Petitioner is a company registered under the Companies Act carrying out operations in the airline business or in the air transportation industry, with an issued share capital of which the majority shares are directly held by the Government of Sri Lanka. Although the Petitioner cannot be expressly identified as a public body, it has the requisite characteristics of a company in which the controlling power is held by the Government. The management of the company affairs are in the hands of the majority shareholders. Generally, companies which issue shares are governed according to this principle of majority rule. It is quite visible that the intention of the Legislature, in crafting the language to exclude certain entities from the liability under the said Act, was to employ the above 'majority rule' in respect of the companies. Perhaps, that may be to avoid causing an additional burden to the Treasury to pay the budgetary relief allowance to the employees of entities where the Government holds the direct controlling power. Similarly, I am satisfied that the express intention of the Legislature when enacting the said Act, was to provide benefits to the employees of the private sector, subject to the other provisions of the said Act.

In *Trade Exchange (Ceylon) Ltd v. Asian Hotels Corporation Ltd. (1981) 1 S.L.R. 67 at 75* the Supreme Court has referred to the majority rule in respect of companies and has observed;

"It is true that in this case, the Government, through the Co-operative Wholesale Establishment, having contributed a major portion of the share-capital, enjoys extensive powers in the conduct of the company. But these powers are derived from the fact of majority-share -holding and the operation of the rule of the majority which governs corporate membership rights and not by reason of the company being the agent of the Government..."

The Asian Hotels Corporation Limited is the Respondent of the above case and it is a public company incorporated under the provisions of the Companies Law. The majority of the shares of the said company was held by Co-operative Wholesale Establishment (CWE) which is a wholly state-owned undertaking incorporated by a statute (Co-operative Wholesale Establishment Law No. 47 of 1949). In such environment, Sharvananda J (in the above case) was reluctant to accept the Asian Hotels Corporation Limited as a public body which will be subjected to writ jurisdiction. However, the fact remains that the

majority of the shares of the said Asian Hotels Corporation Limited were held by the Government through the CWE.

In the circumstances, the question in the instant Application at this stage is whether Sri Lankan Airlines (Petitioner), which is not a public body incorporated under a specific statute, could seek an exclusion under the interpretation given in Section 14 of the said Act.

The Petitioner has made lengthy submissions in order to substantiate the argument that the Petitioner Company is not liable to pay the allowances under the said Act to the particular group of employees. The Petitioner has even referred to the State Industrial Corporation Act No.49 of 1957 to elaborate the establishment of entities by a written law and under a written law. While appreciating such strenuous submission made on behalf of the Petitioner, I need to stress that I do not intend to make a deep analysis of such submissions. It is because I am of the opinion, in light of my findings above, that this is a fit case to resolve the immediate questions before Court conveniently with the aid of the language adopted in the interpretation of the words given to a "public corporation" in Article 170 of the Constitution. Despite the fact that the said interpretation given to "public corporation" will not directly contribute to my findings in the instant Application, the 1st to 3rd Respondents rely upon the same interpretation in a different perspective to which I am not inclined to agree.

Article 170:

“public corporation” means any corporation, board or other body which was or is established by or under any written law other than the Companies Ordinance, with funds or capital wholly or partly provided by the Government by way of grant, loan or otherwise; (Emphasis added)

The words '*any corporation, board or other body which was or is established by or under any written law*' in Article 170 are identical to the respective phrase of the interpretation in Section 14 of the said Act (Budgetary Relief Allowance of Workers Act). In terms of the interpretation in Article 170, a 'public corporation' means a corporation, board or other body; and such corporation, board or other body should be established by or under any written law; further, the said corporation, board or other body should carry out an industry, business or undertaking. The only difference the Legislature has made in the interpretation in

Section 14 of the said Act is to omit the word 'Companies Ordinance' from the relevant provisions in Section 14. In Article 170 of the Constitution, the Companies Ordinance is excluded from the list of written laws by which a body can be established and it is probably because the status of a company registered under the Companies Ordinance is different to a corporation or board.

It can be assumed that the framers of the Constitution have acknowledged in the said Article 170, the fact that a body may be duly established by the Companies Act. However, the entities that are being established by the Companies Act have been excluded from the said interpretation given to a 'public corporation' whereas, the Legislature in the Budgetary Relief Allowance of Workers Act has not made any reference to the Companies Act. As such, I take the view that I need not advert to any authority or principal to arrive at a conclusion that a body established under the Companies Act is clearly encapsulated in the relevant phrase in section 14 of the said Act.

The provisions adopted in interpretation Section 46 of the Parliamentary Budget Office Act No. 06 of 2023, which is a latest Act passed by Parliament, are also apt here. Whilst accepting the same meaning assigned to the words 'public corporation' in Article 170 of the Constitution, the said interpretation Section 46 has given a wide meaning to the words 'public institution' as follows;

“Public Institution” means any Ministry, Department of Government, public corporation, local authority and business or other undertaking within the meaning of the Conversion of Government Owned Business Undertakings into Public Corporations Act, No. 22 of 1987, or a company registered or deemed to be registered under the Companies Act, No. 07 of 2007, in which the Government, a public corporation or any local authority holds more than fifty per centum of the shares and any Ministry or Department of any Provincial Council or any Authority established by or created by a Provincial Council. (Emphasis added)

In light of the above, I am compelled to arrive at the conclusion that any company registered under the Companies Act will be excluded from the liability under the Budgetary Relief Allowance of Workers Act provided the Government directly owns the majority of the share capital of the said company.

The words 'share capital' incorporated in the relevant interpretation of Section 14 of the said Act also have a considerable impact on my conclusion above as a corporation or a body incorporated or established by a statute may not mandatorily issue shares, and have a shareholding which is recognized by the Companies Act. I am of the view that even this aspect is quite comprehensive to decide that a company registered or incorporated under the Companies Act is excluded from the liability of paying budgetary relief allowances as mentioned in the said Section 14 of the Act, subject to other conditions.

In view of the foregoing, I am of the view that several other submissions made on behalf of the parties, including the issues upon collective agreements and 'similar allowances', are not necessary to be dealt with in arriving at the final conclusion of the instant Application. The preliminary objections raised on behalf of the 4th Respondent on necessary parties need not be examined, in my view, as this Court is competent to determine the main questions of law involved here without the presence of the parties highlighted by the 4th Respondent. The other preliminary objections such as suppression of material facts, willful misrepresentation and failure in the duty of *uberima fides*, raised on behalf of the 4th Respondent, in my view, can be put in to a basket of stereo type preliminary objections considering the overall circumstances of this case and comprehensible questions of law involved in the instant Application. Apart from the similar preliminary objections raised, the main contention of the 1st to 3rd Respondents as I understand, are based on the main portion of the interpretation given to the words 'employer' and to 'industry or service' in the said Act.

It was submitted on behalf of the 1st to 3rd Respondents that the exemptions provided in respect of 'industry or service' in Section 14 of the Act cannot be construed as an all-encompassing exception simpliciter for purposes of exempting all Government businesses based on the purported reason that the Government interest expressly includes in the main part of the said Section. Those Respondents further contend that the definition given to 'employer' in the said Section 14 includes a competent authority of a business undertaking vested in the Government under any written law. Though such arguments formulate a formidable opposition, it needs no further evaluation based upon such points of view as the main question of this case is to examine whether the Petitioner Company has met both the requirements which are elaborated in the said *Grand Oriental Hotel Case*. Understandably, there can be business undertakings vested in the Government under any

written law such as Revival of Underperforming Enterprises or Underutilized Assets Act No. 43 of 2011 where the Government becomes the holder of the total shares of such underperforming enterprises by way of vesting such shares in the Government under the said written law.

In the circumstances, I hold that the Petitioner Company is not liable to pay budgetary relief allowances under the said Act to the employees whose names are mentioned in the Notices marked 'J4 and 'T'. Hence, I proceed to grant reliefs as prayed for in the paragraphs (b) to (f) of the prayer of the Petition of the Petitioner.

Application is allowed.

Judge of the Court of Appeal

Dhammika Ganepola J.

I agree.

Judge of the Court of Appeal