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 Sri Lanka.

Original Apparel (Private) Limited

No.242, Galkade Junction,

Welmilla,

Aluthgama,

Bandaragama.

PETITIONER

C.A. (Writ) Application No. 158/22

Vs.

1. Commissioner General of Labour

   Labour Secretariat

   No. 41, Kirula Road,

   Colombo 05.

2. Assistant Commissioner of Labour

   (Kandy South),

   District Labour Officer (Kandy South),

   No. 111, Yatinuwara Street,

   Kandy.

3. Kodithuwakku Arachchige Asoka Ariyathilake,

"Pramod", Balagolla Road,

Adikarigama.

4. Giorgio Morandi (Private Limited)

No. 264, Grandpass Road,

Colombo 14.

RESPONDENTS

Before : Sobhitha Rajakaruna, J.

Dhammika Ganepola, J.

Counsel : Sanjeewa Ranaweera for the Petitioner.

Shiloma David S.C for the 1st and 2nd Respondents.

Ravindranath Dabare with Hansanie Imalka for the 4th Respondent.

Supported On : 21.02.2023

Written Submission tendered On : Petitioner : 08.05.2023

1st and 2nd Respondents : 28.04.2023

Decided On : 10.08.2023

Dhammika Ganepola, J.

The Petitioner in this application seeks a mandate in the nature of Writ of Certiorari quashing the decision requiring the Petitioner to pay gratuity to the 3rd Respondent on the premise that the 3rd Respondent had been employed by the Petitioner.

Factual Matrix

The apparel manufacturing facility owned by the 4th Respondent has been taken on lease by the Petitioner for a period of five years commencing from 01 May 2016 by the Transaction Agreement marked P2. By the said agreement P2, the Petitioner has agreed to employ 118 employees of the 4th Respondent Company whose names are reflected in Schedule 4 to the Agreement P2 on fresh contracts of employment with effect from 01 May 2016. It has been further agreed to settle all statutory dues in respect of the employees listed in Schedule 4 of the P2 by the 4th Respondent.

The Petitioner states that the 3rd Respondent was employed by the 4th Respondent as a Maintenance Supervisor with effect from 14 October 2013 and resigned from the 4th Respondent on 30 April 2016. The 3rd Respondent who resigned from the 4th Respondent Company was employed by the Petitioner under a series of fixed-term contracts marked *P5(a)* to *P5(d)* from 02 May 2016 until 16 April 2020 from time to time.

Subsequently, upon a complaint made by the 3rd Respondent to the 2nd Respondent in respect of non-payment of gratuity by the Petitioner, an inquiry had been held and the Petitioner was informed to pay Rs.122,850/- as gratuity including the surcharge on the basis that the 3rd Respondent had been employed by the Petitioner from 14 October 2013 to 16 April 2020 by the letter dated 20 December 2021 marked P7 and its annexure P8.

The Petitioner contends that the Petitioner Company came into existence only on 24 July 2015. Hence the 3rd Respondent cannot be considered to have been employed by the Petitioner from 14 October 2013. Further, as submitted by the Petitioner, since the 3rd Respondent was not an employee of the 4th Respondent Company at the time of the execution of the said Agreement P2 on 01 May 2016, his name was not included in the list of employees set out in Schedule 4 of the P2. On the said circumstances the Petitioner submits that the decision to pay gratuity to the 3rd Respondent on the premise that the 3rd Respondent had been employed by the Petitioner from 14 October 2013 to 16 April 2020 is unfair, illegal, irrational, and unreasonable.

Liability for Payment of Gratuity

In terms of the document marked P8 gratuity has been calculated by the 2nd Respondent on the basis that the 3rd Respondent has joined the service of the Petitioner on 14 October 2013 and the date of departure as on 16 April 2020. As per the Certificate of Incorporation marked P1, the Petitioner Company has been incorporated as a private company on 24 July 2015. As per the documents marked P5(a) to P5(d) it is evident that the 3rd Respondent has been employed by the Petitioner Company from 02 May 2016 to 16 April 2020 on fixed-term service contracts extended from time to time. Hence on the alleged date on which the 3rd Respondent joined the Petitioner Company, the said Company had not existed. Accordingly, the reference made in document P8 on the date (14 October 2013) the 3rd Respondent joined the Petitioner Company is ex-facie inaccurate.

Nevertheless, since the Petitioner has taken over the apparel manufacturing facility owned by the 4th Respondent on lease from 01 May 2016 onwards by the Transaction Agreement marked P2, when determining the liabilities of the Petitioner and the 4th Respondent in respect of payment of statutory dues, it is imperative to take into account the terms and conditions within the agreement P2 as well as the relevant statutory provisions.

In terms of Clause 1.3.1. of the agreement marked P2 the Petitioner has agreed to employ 118 employees of the 4th Respondent Company who were listed in Schedule 4 of the P2 on fresh contracts of employment commencing from 01 May 2016 (the effective date of the P2) on new terms and conditions. Although the Petitioner claims that the 3rd Respondent's name is not listed in Schedule 4 of P2, it is observed by this Court that the 3rd Respondent's name is also among said employees listed. (*See item no.15 of the Schedule of P2*). In terms of Clause 1.3.2. of P2, the 4th Respondent is liable to settle all the statutory dues up to the effective date in respect of the said employees. In spite of this arrangement, it must be noted that the payment of gratuity is a liability imposed on the Employer by statute. The written law pertaining to this is included in Section 5(1) of the Payment of Gratuity Act.

> *5(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. [Emphasis added]*

The 4th Respondent has leased out his apparel manufacturing facility to the Petitioner with effect from 01 May 2016 by P2. In the event of such an alienation, Section 14 of the Payment of Gratuity Act delineates how to compute Gratuity by the succeeding employer following such alienation. Said Section 14 is as follows;

> ***14.*** *Where an employer sells or otherwise alienates any land or establishment within a period of five years of his becoming such employer, the period of service of any workman under that employer shall be added to the period of service of that workman under the new employer in computing the gratuity payable to that workman by the new employer.*

Hence, in the above context the Petitioner's argument that their company was established on 24 July 2015, and therefore, the 3rd Respondent cannot be deemed to have been employed by them since 14 October 2013, fails. The 4th Respondent had taken the liability to pay statutory dues up to the effective date in respect of the employees listed in Schedule 4 of the P2, in compliance with Clause 1.3.2. However, the liability to pay gratuity by a new employer (Petitioner) imposed by the Payment of Gratuity Act as mentioned above cannot be overridden by an agreement between the

Petitioner and the 4th Respondent. An agreement of this nature may lead to a conflict between the respective employers that may cause a back-and-forth dispensation of liability in respect of the payment of Gratuity to employees and sometimes may allow employers to escape from their statutory liability. Additionally, if agreements of this nature were to be allowed, it may also give rise to situations where the previous employer may not be in existence by the time the payment of Gratuity becomes due. Therefore, such an arrangement is contrary to the public policy and the intention of the legislature and allowing the same may severely affect the statutory rights of the employees. It is observed that a condition under an agreement between parties cannot override the general law of the country.

The rationale that public interest or the intention of the legislature could not be overridden by private arrangements was upheld in Case No. SC Appeal 65/2016, Chandra Ediriweera Vs. Sadhasivam Sivagankan, decided on 11 September 2020 by the Supreme Court. For the reasons given above, I am not inclined to accept the submission made by the Petitioner that the 4th Respondent is liable to pay Gratuity to the 3rd Respondent as per the terms of P2.

Resignation of the 3rd Respondent

The Petitioner submits that based on the resignation letter marked as P4, the 3rd Respondent resigned from the 4th Respondent Company on 30 April 2016. It is worth noting that the 3rd Respondent tendered his resignation prior to the effective date of P2. If the 3rd Respondent had duly resigned from the 4th Respondent Company as per the resignation letter P4, the commencement of his employment at the Petitioner Company under the fixed term contract marked P5a would have formed a fresh contract of employment signifying a clear break between the previous employment under the 4th Respondent and the new employment under the Petitioner. On the contrary, had the purported resignation not been effective, it would give rise to an uninterrupted continuation of employment that spans across the period of ownership of both the 4th Respondent and the Petitioner. In such circumstances, assessing whether the purported resignation P4 has been duly accepted by the 4th Respondent to become operative is pertinent.

A copy of the letter of appointment issued to the 3rd Respondent has been submitted marked as P3 proving that the 3rd Respondent was effectively employed by the 4th Respondent. As per Clause 7 of the P3, in the event of resignation, the 3rd Respondent must give one month of prior notice of such resignation to the Petitioner. In the ordinary course of events, an employee would be acting within his contractual rights if he/she tenders a notice of resignation in compliance with the requirements of the contract of service. Such a notice does not require further acceptance. The 3rd Respondent tendered his resignation P4 on 30.04.2016 which was meant to take effect on the same date. However, such a letter of resignation is inconsistent with Clause 7 of the letter of appointment P3.

The general rule regarding a resignation is that such resignation unless tendered in compliance with the terms and conditions of the contract of service, shall become effective on the date on

which the letter of resignation is accepted by the appropriate authority. Therefore, such resignation will not take effect until it is accepted by the respective authority. In Abeywickrama *v.* Pathirana (1986) 1SLR 120 the Supreme Court held that the letter of resignation did not bring about a valid termination of the workman's contract of service because it was not addressed to nor accepted by the appointing authority.

Mere submission of the letter of resignation by the 3rd Respondent shall not be evidence of termination of the contract of service under the 4th Respondent Company. Neither the Petitioner nor the 4th Respondent submitted any proof of acceptance of the letter of resignation P4. In the absence of such proof, this Court has no evidence to accept that the employment of the 3rd Respondent under the 4th Respondent Company has come to an end on 30 April 2016.

Calculating the Period of Service for Payment of Gratuity and Gaps between Fixed-Term Contracts

As mentioned above, the Petitioner argued that the 3rd Respondent's service period under Petitioner is less than five years. In terms of section 5(1) of the Payment of Gratuity Act, a workman with a period of service of not less than five completed years is entitled to gratuity. Upon perusal of the fixed-term contracts marked P5(a) to P5(d) entered into between the Petitioner and the 3rd Respondent from time to time, I observed that the cumulative period of service of the 3rd Respondent in the Petitioner Company from 02 May 2016 to 16 April 2020 is less than 5 years.

However, Section 14 of the Gratuity Act focuses on situations where employment continues while the employer alienates the company to a new employer. While the resignation of the 3rd Respondent failed to take effect due to the non-acceptance of the resignation by his then employer 4th Respondent, name of the 3rd Respondent was also included in the list of employees in Schedule 4 of the alienation agreement P2 which comprised the names of the employees whom the Petitioner agreed to employ. Besides, the Petitioner has entered into a fixed-term contract with the 3rd Respondent on 02 May 2016. As such, in view of Section 14 of the Payment of Gratuity Act referred above, the service period of the 3rd Respondent under the 4th Respondent Company shall be added to the period of service under the Petitioner Company in calculating the time period to qualify for the gratuity under Section 5(1) of the Act. Hence, it is observed that for the purposes of Section 5(1) of the Gratuity Act, the 3rd Respondent has served a period of service of not less than five completed years under that Employer.

Nevertheless, the Petitioner further contends that there are clean breaks between those fixed-term contracts and therefore, the 3rd Respondent is not eligible to claim the continuous period of service under the Petitioner. It is observed that there are brief gaps in time between the several fixed-term contracts entered into between the Petitioner with the 3rd Respondent. Hence, it is imperative to address the issue of whether, despite such gaps in the time, the 3rd Respondent has

an uninterrupted “completed service”. The phrase “period of completed service” referred to under Section 5(1) of the Act is interpreted under Section 20 of the Act as follows:

> *‘Completed Service’ means uninterrupted service and includes service which is interrupted by approved leave on any ground whatsoever, a strike or lockout or cessation of work not due to any fault of the workman concerned, whether such uninterrupted or interrupted service was rendered before or after the coming into operation of this Act.*

In the above context, it appears that the “completed service” for the purpose of the Payment of Gratuity Act should be an uninterrupted service. Hence, at this stage what needs consideration is whether the total period of service of the 3rd Respondent should be taken into consideration for gratuity benefits under the Payment of Gratuity Act despite that the Petitioner has entered into several contracts with the 3rd Respondent with insignificant gaps in between. However, the mere fact that there exist gaps between the fixed-term contracts does not necessarily mean that there was a termination of employment or an interrupted service every time the fixed-term contract ended due to effluxion of time. I am of the view that if such gap is not too long, if the employee is offered a new contract on the same terms and conditions as the previous contract and if the employee accepts the new contract, a gap in between one fixed term contract ending and another starting will not necessarily break continuity. When the circumstances of the instant scenario are taken into consideration, it appears that the breaks in between the fixed-term contracts i.e. approximately one-month in between, in subject are insignificant and the Further, it is observed that the terms and conditions of the fixed-term contracts in subject are identical to each other and the 3rd Respondent has effectively accepted the fixed-term contracts in subject. As such, it is apparent that the work done by the employee in question was of a continuous nature.

Non-acceptance of the letter of resignation P4 by the 4th Respondent and the appearance of the name of the 3rd Respondent in the list of employees’ setup in Schedule 4 of the P2 are vital grounds for this Court to assess the continuous nature of the respective agreement. This Court was of the view that it is significant to obtain a clarification from the parties in respect of the nature of the contracts of employment entered into between the Petitioner and the 118 other employees whose names are scheduled in Schedule 4 of P2. Despite such an undertaking, the parties have failed to follow through on the said commitment. It would have been easier to determine the nature of the 3rd Respondent's employment with the Petitioner if clarification had been provided. However, no reasonable grounds have been submitted to the court to differentiate the 3rd Respondent from the whole bulk of employees who have been absorbed into the Petitioner company.

It is also worth noting that both parties have intended to continue the nature of the employment across all fixed-term contracts (P5a to P5d). Therefore, in conclusion, the 3rd Respondent’s employment in the Petitioner’s Company was uninterrupted and was within the ambit of the term “completed service” as stipulated in Section 20 of the Act.

Conclusion

In the facts and the circumstances stated above, I see no reason to intervene with the determinations reflected in the documents marked P7 and P8 directing the Petitioner to pay gratuity to the 3rd Respondent on the premise that the 3rd Respondent had been employed by the Petitioner from 14.10.2013 to 16.04.2020. Therefore, I am not inclined to grant the reliefs prayed for in the prayer to the Petition by the Petitioner. Accordingly, the application is dismissed. I order no cost.

Application dismissed.

Judge of the Court of Appeal

Sobhitha Rajakaruna J.

I agree.

Judge of the Court of Appeal