

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

In the matter of an application for orders in the nature of Writs of Certiorari, Mandamus and Prohibition in terms of Article 140 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

C.A. Writ No.52/2023

Greentech Consultants (Pvt) Limited,
No.94/50, Kirulapone Avenue,
Colombo 5.

Petitioner

Vs.

1. P.W.G.S.S. Perera,
Labour Officer,
Colombo East District Labour Office,
18th Floor, Department of Labour,
Colombo 5.
2. W. P. M. P. Wijayawardhana,
Assistant Commissioner of Labour,
Colombo East District Labour Office,
18th Floor, Department of Labour,
Colombo 5.
3. Area Business Manager,
Regional Officer (Colombo 1-7),
Employees Trust Fund Board,
Colombo East District Labour Office,
18th Floor, Department of Labour,
Colombo 5.
4. Steeven Joseph Siriwardena,
No.969/9, School Lane,
Pelawatte, Battaramulla

Respondents

Before : N. Bandula Karunaratna J. (P/CA)

&

M.A.R. Marikar J.

Counsel: Nigel Hatch PC with Manoj Bandara instructed by Induni Bandara for the Petitioner.
Amasara Gajadeera SC for the 3rd Respondent.

Argued on : 21.02.2023

Decided on: 15.03.2023 .

M. Ahsan R. Marikar J.

Introduction

- 1) The petitioner had made this application, by a petition dated 29th January 2023, for this court to issue an order in the nature of Writ of Certiorari and Writ of Prohibition and sought interim orders to restrain the 1st, 2nd and 3rd respondents taking any steps pursuant to the purported determinations and/or notices marked X19(a) to X19(c) and X23(a) and/or X23(b) until the final determination of this application.

Background of the case

- 2) The position taken by the petitioner in the instant application is that, the petitioner is a Development Consultancy Firm that provides consultancy services in Urban Development, Public Infrastructure Development, Water and Sanitation, Environment, and Socio-Economic sectors.
- 3) The petitioner by the agreement marked and produced as X3, had agreed to provide a wide range of consultancy services for the Colombo National Highway Project.

- 4) The 4th respondent as an independent consultant, was engaged as a Technical Officer for the said project from around July 2017 until June 2021.
- 5) A dispute had arisen between the petitioner and the 4th respondent, when the 4th respondent claimed EPF and ETF from the petitioner. Subsequently, the 4th respondent had complained to the 1st and 2nd respondents. Then the 2nd and 3rd respondents had issued a determination after holding an inquiry, for the petitioner to contribute to the arrears and surcharge which is referred to in X19(a) to X19(c) and X23(a) and X23(b).

Disputed Facts

- 6) Mr. Nigel Hatch President's Counsel appeared for the petitioner and sought an interim relief against the respondents restraining the 1st, 2nd and 3rd respondents from taking any steps on the purported determinations made by the 2nd and 3rd respondents.
- 7) The State Counsel Amasara Gajadeera did not mark the appearance for the 1st, 2nd and 3rd respondents; however, the court assistant submitted that, the 4th respondent is an employee of the petitioner. Therefore, an inquiry was held by the Labour Department and the determination was issued in accordance to the principle considering employer and employee.
- 8) However, considering the argument raised by the Counsel for the Petitioner, it is based on whether the 4th respondent is an employee of the petitioner or whether he had worked on contract basis.

- 9) On the aforesaid arguments and considering the written submissions, the following disputed facts should be considered to issue an interim order.
- i) Was the 4th respondent an employee of the petitioner?
 - ii) Can the 4th respondent work under several employers?
 - iii) Is the petitioner entitled for an interim order as prayed for in the prayer of the petition? If not, on the impugned determination will the final relief claimed by the petitioner be nugatory?

Was the 4th Respondent an employee of the Petitioner?

- 10) The crux of this matter is to determine whether the main argument is that the 4th respondent is an employee of the petitioner.
- 11) The President's Counsel Nigel Hatch vehemently argued and emphasized that the 4th respondent was engaged as an independent contractor to the project, which was contracted by the petitioner.
- 12) To support that, he had produced documents X5(1) to X5(38), X5A (1) to X5A (48).
- 13) On the said documents the counsel for the petitioner had reiterated on page 4 and 5 of his Written Submissions that, the 4th respondent's payments had been made as consultancy fees based on the invoices furnished by him and the other documents too had indicated that the 4th respondent had received the payments as an independent contractor.

- 14) Besides these facts, the petitioner had submitted that there was no employment contract entered between the petitioner and the 4th respondent.
- 15) The grievance put forward before this court is that, the 1st and 2nd respondents had not considered these facts at the inquiry stage and/or whether the 3rd respondent had not replied the letter sent by the petitioner, which is marked and produced as X22.
- 16) The State Counsel appeared for the 3rd respondent. Amasara Gajadeera argued that the 4th respondent is an employee as defined in section 47 of the EPF Act and relied on the judgment of **Bojan Koluundzija v. W.V.P.K. Weerasinghe and others**¹decided on 23.01.2020 and submitted that the determination made by the Labour Commissioner is correct and the petitioner has failed to exhaust the statutory remedy referred to under section 33(1),33 (2) and 34 of the Employees' Trust Fund Act.
- 17) In considering the aforesaid arguments, according to our view there are matters to be considered relating to the application, whether the 4th respondent is an employee or not.
- 18) The said facts should be determined at the final argument.

Can the 4th Respondent work under several employers?

- 19) The aforesaid dispute had been raised by the Counsel for the petitioner. The State Counsel who appeared for the 3rd respondent was silent on this issue.

¹CA (Writ 339/2014).

20) As per the documents marked and produced as X26(a) and X26(b), on the face of it, the 4th respondent had been employed with a 3rd party. Therefore, the question arises whether an employee can have two employers. That is a matter on which this court has the jurisdiction to observe with its judicial review.

Is the Petitioner entitled for an interim order as prayed for in the prayer of the Petition? If not, on the impugned determination will the final relief claimed by the Petitioner be nugatory?

21) In considering the aforesaid disputed fact, we draw our attention to the judgment of **Duwearatchi and Another V. Vincent Perera and Others**². In the said judgment the following principles had been laid down.

An interim stay order in a writ application is an incidental order made in the exercise of the inherent or implied powers of the Court. The Court should be guided by the following principles,

(i) Will the final order be rendered nugatory if the petitioner is successful?

(ii) Where does the balance of convenience lie?

(iii) Will irreparable and irremediable mischief or injury be caused to either party?

22) Further, we note that in **Jafferjee V. Commissioner Labour and Others**³;

²[1984] 2 SLR 94.

³[2008] 1 SLR 12.

*“The remedy by way of certiorari cannot be made use of to correct errors or to substitute a correct order for a wrong order. Judicial review is radically deferent from appeals when hearing an appeal the Court is concerned with the merits of the decision under appeal. In appeal the appellate Court can modify, alter, substitute or rescind the order or decision under appeal. (Vide Article 138 of the Constitution that gives the forum jurisdiction to the Court of Appeal for the correction of all errors in fact, or in law, committed by Courts of first instance, tribunal or other institution.) In Judicial review the Court is concerned with its legality and cannot vary, modify, alter or substitute the order under review. On appeal the question is right or wrong, on review, the question is lawful or unlawful. Instead of substituting its own decision for that of some other body as happens when an appeal is allowed, a Court on review is concerned only with the question whether the act or order under attack should be allowed to stand or not. **Footwear (Pvt.) Ltd., and two others v Aboosally, former Minister of Labour and Vocational Training and others**⁴.*

*Diplock, L.J. in **R. v Deputy Industrial Inquiries Commissioner ex parte Moore**⁵ opined as follows I quote; "the requirement that a person exercising quasi-judicial functions must base his decision on evidence means that it must be based on material which tends logically to show the existence or non-existence of facts relevant to*

⁴[1997] 1Sri LR 137.

⁵ [1965] 1All ER at 84.

the issue to be determined, or to show the likelihood or unlikelihood of the occurrence of some future event the occurrence of which could be relevant. It means that he must not spin a coin or consult an astrologer; but he may take into account any material which, as a matter of reason, has some probative value; the weight to be attached to it is a matter for the person to whom parliament has entrusted the responsibility of deciding the issue. The supervisory jurisdiction of the Court does not entitle it to usurp this responsibility and to substitute its own view for his".

*Sharvananda, C.J. quoted this statement of law with approval in **Chulasubadra v The University of Colombo and others**⁶.*

- 23) In the said judgement it is specified the context on which the Court of Appeal has emphasized the distinction between its appellate jurisdiction and its powers of judicial review to decide the employer employee contract.
- 24) In the aforesaid circumstances, if steps are taken to enforce the impugned determination of the 3rd respondent before the final determination of this application, in the event the petitioner is successful in the final order, it will be nugatory.
- 25) In the said circumstance, we are of the view that the balance of convenience lies in favour of the petitioner and there are a series of matters to be considered at the stage of the main argument.

⁶[1986] 2 Sri LR 288.

Conclusion

26) In view of that we issue interim orders prayed for in the prayer of the petition dated 29th January 2023, prayer (g), (h), (i) and (j) until the final determination of the Petitioner's Application.

Judge of the Court of Appeal

N.Bandula Karunarathna J. (P/CA)

I agree.

President of the Court of Appeal.