

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

In the matter of an application for Restitutio
in Integrum under Article 138(1) of the
Constitution of the Democratic Socialist
Republic of Sri Lanka.

CA/RII/08/2016
CHC Case No. 1254/2002/ARB

Board of Investment of Sri Lanka,
World Trade Centre,
26th Floor, West Tower,
Echelon Square,
Colombo 01

Respondent Petitioner

Vs.

Million Garments (Pvt) Ltd.,
No. 14/7, Saparamadu Mawatha,
Nugegoda (Head Office as of now
Situating at A/14/2/3 Matha
Road, Narahenpita.

Petitioner Respondent

Before: Hon. D.N. Samarakoon, Judge of the Court of Appeal
Hon. Neil Iddawala, Judge of the Court of Appeal

Counsel: Ronald Perera P. C., with Mohamed Sharafi, instructed by Shiranthi Gunewardane Associates for the respondent petitioner.
Ruwantha Coorey, with Naamiq Nafaath, for the petitioner respondent.

Supported on: 03.03.2023

Date: 18.05.2023

ORDER

D.N. Samarakoon, J.

The dispute pertaining to this case has arisen in 1992.

It was the cancellation by the Respondent Petitioner (Board of Investments, Sri Lanka) of the agreement entered into with the Petitioner Respondent (Million Garments (Pvt) Ltd.,) dated 05.11.1992 that led to this dispute.

The dispute was referred to arbitration before late Hon. Douglas Wijeratne. As per a settlement, the petitioner paid Rs. 23.835,535/- The position of the petitioner is that after about two years, the respondent Million Garment (Pct) Ltd., filed case No. 1254/2002/ARB in the Commercial High Court of Colombo seeking to enforce the Arbitral Award.

While proceedings before Commercial High Court was pending, the petitioner made a complaint to the Criminal Investigations Department and subsequently

Criminal High court case No. 3127/2006 was instituted. The judgment dated 16.10.2020 found the accused guilty of forging the Arbitral Award.

In the meantime, the Commercial High Court, on the Arbitral Award, held against the petitioner. The petitioner's Leave to Appeal application to the Supreme Court was dismissed as it was one day late. The petitioner filed an application under section 839 of the Civil Procedure Code challenging the execution of the decree. The respondent moved the Commercial High Court to release seized money. The present application by the petitioner for restitutio in integrum was made on 28.06.2016. One of the reliefs asked for is to restore the position prior to the order dated 18.12.2014 seizing a sum of Rs. 102,138,350/- from the bank account of the petitioner.

The Commercial High Court judgment upholding the Arbitral Award is dated 14.05.2012. It was made by the Hon. Judge of the Commercial High Court, Mr. P. W. D. C. Jayathilake.

The above timeline shows, that, the order of Mr. Jayathilake, (2012) as well as the institution of this application in restitutio in integrum (2016) was done at a time prior to the Criminal High Court judgment (2020) came into existence.

The position of the petitioner is that the respondent filed a document, as Arbitral Award, which is neither the original nor a certified copy.

After the Leave to Appeal application of the petitioner was dismissed, as per, paragraph 12 of the petition dated 26.06.2016, the Fiscal by order of the Court dated 18.12.2014 seized a sum of Rs. 102,138,350/- from the Bank Account of the petitioner, which was remitted to the credit of the original Court action.

It is, as per paragraph 21 of the said petition, being aggrieved by the said order dated 18.12.2014, the petitioner moves to invoke the jurisdiction to restore.

Paragraphs (c),(d) and (e) of the prayer to the petition reads,

(c) Grant an issue an order in the nature of restitutio in integrum restoring the parties to the original condition prior to the order dated 18th December 2014 seizing a sum of Rs. 102,138,350/- from the Bank Account of the petitioner,

(d) Set aside the order dated 18th December 2014 delivered by the Honourable Judge of the Commercial High Court in the case bearing No. H. C. (ARB) 1254/2002,

(e) Issue an order staying the operation of the order dated 18th December 2014 delivered by the Honourable Judge of the Commercial High Court and staying further proceedings of the case bearing No. H. C. (ARB) 1254/2002 until the hearing and final determination of this application,

Hence it would appear, that, although the petitioner now seeks to stop the hearing of this case until the appeal before the Court of Appeal, pertaining to the conviction in the Criminal High Court case (2020) is decided, the petitioner invokes the jurisdiction of this Court from a point subsequent in time (2014) in case No. H. C. (ARB) 1254/2002, but not from or before its judgment in 2012.

S. C. (H. C.) L. A. Application No. 57/2021, C. H. C. Case No. C. H. C. 1254/2002/ARB is the Leave to Appeal application filed by the petitioner against the dismissal of its motion, which was filed after the dismissal by the Supreme Court of petitioner's Special Leave to appeal application on 24.10.2013, on 29.07.2021. The Supreme Court said,

“Subject to the following directions, we dismiss the application for leave to appeal, i.e.,

- (1) B. O. I. is entitled to pursue the Restitutio in Integrum Application No. C. A. /R. I. I. /08/2016 filed in the Court of Appeal by B. O. I.
- (2) Learned Additional Solicitor General informed that CA/HCC/02/37/2020 criminal appeal is pending before the Court of Appeal which has a direct bearing on the said Restitutio in Integrum application pending in the Court of Appeal.

In view of the above, we direct the Court of Appeal to dispose the said appeal as expeditiously as possible.

- (3) The Court of Appeal is further directed to take into consideration of the judgment that would be delivered in the said criminal appeal in deciding the said Restitutio in Integrum Application pending before the Court of Appeal, **if the said judgment has a bearing on the said application.**
- (4) If an appeal is filed against the Court of Appeal judgment which will be delivered in respect of the said criminal appeal, the Court of Appeal is directed to take into consideration of the Supreme Court judgment in deciding the Restitutio in Integrum Application, **if it has a bearing on the said application...**” (The emphasis added in this order)

It is clear from the above order, that, despite the learned Additional Solicitor General, informing that the appeal on the judgment of the Criminal High Court having a direct bearing on this case, the Supreme Court has, as per the parts emphasized above left that question undecided.

Technically, the judgment in the Criminal High Court, or the decision of the Court of Appeal in its appeal, or if there is a further appeal to the Supreme Court, that order, cannot have a bearing in this case, because, the petitioner does not question the Commercial High Court judgment in these proceedings. On the other hand, practically, there can be a connection, because the order dated 14.12.2018 which is questioned in this case emanates from the judgment dated 14.05.2012. This is the difference between theory and experience.

As P. N. Bhagwati, J., (as he then was) said in *Maneka Gandhi vs. Union of India*, 1978,

“Since the life of the law is not logic but experience and every legal proposition must, in the ultimate analysis, be tested on the touchstone of pragmatic realism,...”

Considering the above and,

- (1) A New Bench has been appointed in this Court from February 2023,
- (2) The argument of this case before the Previous Bench of this Court, in which too I was the Presiding Judge, commenced somewhere on 02.08.2021 and continued,
- (3) Since argument has to start afresh,

this Court decides to go on with the argument in this case, taking also into consideration that the Supreme Court has directed the Division of this Court hearing the Criminal Appeal to hear and conclude it expeditiously, to withhold the giving of the judgment, in some future point, if “pragmatic realism” shows such a course of action is advisable.

There is no order on costs.

Judge of the Court of Appeal

Neil Iddawala J.

I agree.

Judge of the Court of Appeal