

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 Writs of Certiorari and Prohibition under and in terms of Article 140 of the Constitution.

Media Services Pvt Ltd
LMD House,
No. 4, Greenlands Avenue,
Colombo 05.

C.A. WRIT NO.372/2022

Petitioner

Vs

1. Commissioner General of Labour
Labour Secretariat,
Narahenpita,
Colombo 05.

2. Mr. W.P.M.P. Wijewardene
Assistant Commissioner of Labour
District Labour Office – Colombo
East
Labour Secretariat,
Narahenpita,
Colombo 05.

3. Lalin Goonesekera
No. 39, Police Lane
Ragama.

ALSO REPRESENTED BY HIS
AGENT /ATTORNEY
Salika Ruwanthi Seneviratne
No. 61/12A, St. Rita Road,
Mount Lavinia.

4. Hon. The Attorney General,
Attorney General's Department
Hulftsdorp,
Colombo 12.

Respondents

Before : **Hon. N. Bandula Karunarathna, J.(P/CA)**
Hon. M. Ahsan R. Marikar, J.

Counsel : Geoffery Alagaratnam P.C with Luwie Ganeshathasan
for the Petitioner

R. Dunuwilla with Suminda Perera for the 3rd
Respondent

Shamanthi Dunuwilla State Counsel for the 1st, 2nd,
3rd and 4th Respondents

Written Submission : Filed by the Petitioner on 25.05.2023
Filed by 3rd Respondent on 25.05.2023

Argued on : 12.06.2023

Decided on : 19.07.2023

M. Ahsan R. Marikar, J.

Introduction

- 1) The Petitioner had instituted this action and sought an interim relief by the petition dated 13th October 2022. The instant application pertinent to the aforesaid petition is to consider issuance of notice and interim relief prayed for in prayer **d)**.
- 2) The said interim relief prayed for is as follows,
d) For an Interim Order, preventing the 1st and/or 2nd Respondents, their agents/delegated officers/or anyone acting under them from relying on or taking any further action against the Petitioner in respect of Gratuity

allegedly due to the 3rd Respondent or surcharge thereon, in terms of the purported determination/purported Notice (P1) and/or from taking any further action or instituting any legal proceedings or maintaining same against the Petitioner pursuant to the purported determination /purported Notice dated 2nd August 2022;

Facts of the case

- 3) The Petitioner had instituted this action against the letter marked and produced as P1 dated 2nd August 2022 on which the Commissioner of Labour had ordered the Petitioner to pay gratuity and the surcharge which is set out in the document P1 to the 3rd Respondent.
- 4) The said order had been made in terms of Payment of Gratuity Act No.12 of 1983¹ as amended.
- 5) The position taken by the Petitioner is, the 3rd Respondent being an employee who had caused losses to the Company is not entitled to gratuity and the order made by the Commissioner of Labour is not from the correct forum to direct the Petitioner to make the gratuity payment. On the said grounds, until the final determination of this case, the Petitioner has pleaded to issue notice to the Respondents and to restrain the 1st and 2nd Respondents from taking action against the Petitioner on letter P1.
- 6) The 3rd Respondent had filed limited objections and vehemently denied the position taken by the Petitioner.
- 7) The 3rd Respondent specifically stated that the Petitioner had not given a single reason for forfeiting the gratuity payment under Section 13 of the Gratuity Act that the 3rd Respondent had committed any fraud or misappropriation of funds.
- 8) Thus, by a mere allegation, the Petitioner cannot maintain this action. Further, the 3rd Respondent had contended that the Petitioner is guilty of

¹ Hereinafter referred to as the Gratuity Act.

lashes and/or inordinate delay of challenging the 1st and 2nd Respondents' decision referred to in document P22.

- 9) Further, the Petitioner has misrepresented the material facts as he has failed to produce the document marked as 3R2 in the CA Writ 33/2018.
- 10) On the said grounds, the 3rd Respondent had submitted that the Petitioner had failed to establish a *prima facie* case and notice should not be issued to the Respondents and the Petitioner is not entitled for the interim relief claimed by the petition.

Disputes between the Petitioner and the Respondents to be considered on issuance of notice and interim order

- 11) Considering the facts pertinent to the application made by the Petitioner and on perusal of the documents, written submissions and arguments raised before this Court, the crux of this application is forfeiting the payment of gratuity. To decide the non-payment of gratuity the following disputed facts can be considered.
 - I. Has the Petitioner declined to pay gratuity and surcharge which is reflected in the letter P1?
 - II. Has the 3rd Respondent obtained an order from the Commissioner of Labour for the payment of gratuity?
 - III. Does the said Commissioner of Labour have the jurisdiction to issue notice P1 and order P22?
 - IV. If not, is the Petitioner entitled for notice and the interim relief claimed?
 - I. Has the Petitioner declined to pay gratuity and surcharge which is reflected in the letter P1?**
- 12) The Petitioner had argued, in the instant application that the gratuity of the 3rd Respondent was forfeited due to the losses caused to the Petitioner by the conduct of the 3rd Respondent.
- 13) The 3rd Respondent had submitted his letter of resignation dated 6th January 2017. The Petitioner had replied by letter dated 27th January 2017, informing the 3rd Respondent of the acceptance of the resignation

and had informed the 3rd Respondent that the Company has decided to forfeit the payment of gratuity and the surcharge due to the losses caused to the Company by the 3rd Respondent.

- 14) On the said circumstances, the Petitioner has admitted that the gratuity and the surcharge which is to be payable to the 3rd Respondent by the Petitioner had not been paid due to the facts related in the letter P12.

II. Has the 3rd Respondent obtained an order from the Commissioner of Labour for payment of gratuity?

- 15) The 3rd Respondent had made a complaint to the Commissioner of Labour, of his entitlement for the gratuity and the surcharge. The Commissioner of Labour by the notice dated 2nd August 2022 had directed the Petitioner to pay the amount referred to in the said notice as the gratuity and the surcharge. The said notice is marked and produced as P1. In the event that the Petitioner fails to make the payment referred to in notice P1, the 1st and 2nd Respondents will take steps under Section 8(1) of the Gratuity Act.
- 16) Further, the Commissioner of Labour had made an order which is marked and produced by P22 after hearing both parties. In the said order the Commissioner of Labour had confirmed the payment reflected in the notice P1. It is obvious that the 3rd Respondent had obtained an order from the Commissioner of Labour for the Petitioner to make the gratuity and the surcharge payment to the 3rd Respondent.

III. Does the said Commissioner of Labour have the jurisdiction to issue notice P1 and order P22?

- 17) The Petitioner had argued that the Commissioner of Labour does not have jurisdiction to determine the payment of the gratuity and the surcharge. However, the Writ Application C.A/33/2018 order had been made on 26th July 2018 for the Commissioner of Labour to inquire into the issue of non-payment of gratuity. The said document is marked and produced as 3R2.

- 18) The Commissioner of Labour had made his order in line with the direction made by 3R2. Therefore, the Counsel appearing for the 3rd Respondent had argued that the Petitioner had suppressed the material facts of non-payment of gratuity.
- 19) Further, the Counsel for the 3rd Respondent had emphasized that the Petitioner had failed to produce any document or material to show that due to the 3rd Respondent's conduct the losses reflected in P12 had taken place.
- 20) The argument put forward by the Petitioner is, the payment of gratuity should be decided by the Labour Tribunal and not by the Commissioner of Labour. I am of the view that this fact should be considered in the main argument. The application has been made only to consider the issuance of notice and interim order.
- 21) In view of 3R2 and document P22, on the face of it, the Commissioner of Labour had not violated any provisions of the Gratuity Act.

IV. If so, is the Petitioner entitled for notice and interim relief claimed?

- 22) In the instant action I do not have to go into the merit of the case. Only the facts, documents and the arguments raised by the parties should be considered in deciding whether there is a *prima facie* case against the Respondents. If so, notice and interim order can be issued.
- 23) It is abundantly clear that the Petitioner had failed to make the payment of gratuity. The grounds claimed by the Petitioner for non-payment is, the loss caused to the Company by the conduct of the 3rd Respondent. To prove that fact, there is no documental evidence or material produced before this Court other than document P25. Document P25 is a plaint filed by the Petitioner against the 3rd Respondent in the District Court of Colombo claiming Rs. 7 800 000/-. The facts pertinent to that plaint has not been proven yet.
- 24) Therefore, my considered view is that the Petitioner has not proven any facts or document to restrain the Commissioner of Labour acting under Section 8(1) of the Gratuity Act.

- 25) Beside these facts, an arguable question is, whether the Commissioner of Labour has jurisdiction to hear and determine the non-payment of gratuity or should it be decided by the Labour Tribunal. The authorities cited by both parties in respect of forfeiting the gratuity payment can be considered in the main argument.
- 26) In the said circumstances the Petitioner is only entitled to issue notices to the Respondents.

CONCLUSION

- 27) In view of the aforesaid analysis and in considering the documents, written submissions and the arguments raised by both parties, in the instant application we are only issuing notice to the Respondents prayed for in the petition dated 13th October 2022.

Judge of the Court of Appeal

N. Bandula Karunarathna, J. (P/CA)

I agree

President of the Court of Appeal