

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.

1. Aranxa Software Private Ltd,
(Firnarly Limewise Counselling
(Pvt) Limited)
Level 2, No. 48, Nawam Mw
Colombo 02.

2. Naresh Mohantissa Ediriwira
Managing Director,
Aranxa Software Private Ltd
Level 02, No. 48, Nawam Mw
Colombo 02.

PETITIONER

C.A. (Writ) Application No.843/2009

Vs

1. Commissioner General of Labour
Department of Labour,
Colombo 05.

2. H.P. Jinadasa

Assistant Commissioner of Labour
Department of Labour,
Colombo 05.

3. Kapila Sanjaya Kodagoda

Director – Eyepax IT Consulting
Private Limited,
No. 66, Norris Canal Road,
Colombo 10.

RESPONDENTS

BEFORE

COUNSEL

: Deepali Wijesundera J.

: Chrishmal Warnasuriya with
Wardani Karunarathne and

Sonali Wanigabaduge Instructed

by M.M.Iynullah for the Petitioner.

Yuresha Fernando SSC for the 1st

and 2nd Respondents.

Jacob Joseph with Nipuni

Amarasinghe for the 3rd

Respondent.

ARGUED ON

: 27th August, 2014

DECIDED ON

: 02nd December, 2014

Deepali Wijesundera J.

Third respondent was employed by the petitioner Company from 01/12/1999 to 31/12/2005 until he voluntarily resigned. By letter dated 01/12/2005 marked as **P6** and **2R1** by both parties, the 3rd respondent has given notice to the petitioner company on 06/07/2006. The 3rd respondent made an application to the 1st respondent alleging that gratuity and salary for two months have been unlawfully detained by the petitioner company although several requests were made by him for payment. Subsequently an inquiry was held and the recommendation of the inquiry officer was given. The 1st respondent acting under *Sec. 50 (c) (2) of Shop and Office Employees Act No.44 of 1985* has issued a certificate which is marked as **P15** dated 22/07/2008 which stated that an amount of Rs. 184,000/= was due to the 3rd respondent from the petitioners.

The petitioners have filed the instant application on 03/12/2009 to invoke the writ jurisdiction of this court to quash the said order marked as **P15**. The petitioners stated that there were no money due to the 3rd respondent as everything had been fully settled.

The petitioner's learned counsel stated that the 3rd respondent while been employed by the petitioner company acting against the

interest of the company, secured projects and principal clients independently and caused the petitioner company substantial damage. Petitioners stated that when the 3rd respondent left the petitioner company the third respondent and the petitioner company have agreed to settle what was outstanding to the 3rd respondent and the petitioner company had set off a laptop computer to the 3rd respondent which he has accepted in lieu of his gratuity payment as shown in P5. This document is a computer print out of an email.

The petitioners counsel submitted that there is nothing due or outstanding to the 3rd respondent from the petitioners and if the 1st respondent were to proceed to recover the money the 3rd respondent would become unduly enriched with money already settled to him. The action filed before the Magistrate to recover the money from the petitioners is unlawful and incorrect due to the proper procedure not being complied with. He further submitted that the 1st respondent is required to satisfy that there is a failure to pay on the part of the employer and recovery of the sum of money is impractical or inexpedient before filing an action to recover money through the Magistrates' Court under Sec. 50 (c) (a) of the Act, and therefore the 1st respondent had erred in law and acted ultra vires. For this argument he cited the judgments in ***Jewel Arts Ltd Vs The Land Acquire officer and two others SC Minister of 28/01/2008*** and ***Lanka Multi Moulds***

(pvt) Ltd Vs Commissioner of Labour 2001 3 SLR 305, Lanka Multi Moulds (pvt) Ltd Vs Wimalasena 2003 1 SLR 152.

The council for petitioners stated that the 1st and 2nd respondents have erroneously filed a charge sheet against the 2nd respondent in the Magistrates' Court as the P15 certificate is issued only against the 1st petitioner company, and that the certificate does not have the 2nd petitioner as an accused as required by law.

Citing the judgments in ***Kegalle Plantations Ltd Vs Silva and others 1996 2 SLR 184*** said the petitioners were never given a fair hearing and that the 1st respondent should give reasons for its decision. This judgment is not at all relevant to the instant case.

The learned Senior State Council for the respondents stated that there is unexplained delay in filing this application. Citing the judgments in ***Hulangamuwa Vs Siriwardena 1986 1 SLR 275 Bisomenike Vs C.R.De Alwis 1982 1 SLR 368, Hopman and Other Vs Ministry of Lands and Land Development and others 94 SLR 240.*** The respondents stated that the petitioner's unexplained delay significantly impacts on the rights of the 3rd respondent.

The respondent's council further submitted that under Sec. 50 (c) (2) of the said Act the issuance of the certificate for recovery of money from employers in default is a final step prior to actual recovery through the intervention of court. The certificate **P15** was issued four months after the findings of the inquiry officer.

The Learned Senior State Council further submitted that the petitioner have failed to add the person described as Syard Bos who is alleged to have entered into a contract of service with the 3rd respondent as a necessary party to this action. The respondents cited the judgments in ***Hettiarachchi Vs Senaratne and others S.C. app 780/99 and Alles Vs Secretary, Ministry of Labour and others SC 387A/96*** in support of this argument. At the inquiry the petitioner's representative had admitted the salary entitlement of the 3rd respondent which had to be paid by a different party. The respondents further submitted that the mere fact that the petitioners admitting the salary entitlement of the 3rd respondent creates liability for the recovery of the same through the intervention of the 1st respondent.

Respondents stated in terms of Sec 19 of the said Act there is a statutory duty caste on the employer for the payment of re-numeration and that non payment of salaries due to the 3rd respondent by the

Petitioner Company is in breach of the law and has violated its statutory obligations.

**Sec. 50 (c) (2) and (3) of the Shop and Office Employees Act
(as amended) states;**

50 (c) (2) Where an employer makes default in the payment of any sum which he is liable to pay as remuneration under subsection (1) and the Commissioner is of opinion that it is impracticable or inexpedient to recover that sum under any other provision of this Act, then, he may issue a certificate containing particulars of the sum so due and the name and place of residence of the defaulting employer to the Magistrate having jurisdiction in the division in which such place is situated. The Magistrate shall thereupon summon such employer before him to show cause why further proceedings for the recovery of the sum due should not be taken against him and in default of sufficient cause being shown the sum in default shall be deemed

to be a fine imposed on such employer by such Magistrate, and shall be recovered accordingly. Every sum so recovered shall be paid to the Commissioner.

50 (c) (3) The correctness of any statement in a certificate issued by the Commissioner for the purpose of this section shall not be called in question or examined by the court in any proceeding under this section, and accordingly nothing in this section shall authorize the court to consider or decide the correctness of any statement in such certificate and the Commissioner's certificate shall be sufficient evidence that the amount due under subsection (1) from the defaulting employer has been duly calculated and that such amount is in default.

Therefore the petitioner's argument that the 1st and 2nd respondents have acted ultra vires and erred in law fails as it is very clearly stated in the Act that the 1st and 2nd respondents had powers

under the said act to take steps to recover the money due from the petitioners.

The petitioners tried to mislead court by stating in his submission that there is ample evidence in **P16** that the 3rd respondent's salary was paid in full. On perusal of the said document marked **P16** it is quite clear he has been paid only up to October 2005. A petitioner should come to court with clear hands.

The document the petitioner seeking to quash marked as **P15** is dated 22/07/2008. The instant application has been made on 13/12/2009 nearly one and a half years later. There is undue and unexplained delay by the petitioners as stated by the respondents.

The appellants have failed to give an explanation for their conduct and the delay in making their application to this court and hence this court can not be faulted for exercising its discretion against the issue of writ therefore I dismiss this application with costs fixed at Rs. 25,000/=.

JUDGE OF THE COURT OF APPEAL