

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

*In the matter of an Application for a Mandate
in the nature of Writ of Certiorari under Article
140 of the Constitution of the Democratic
Socialist Republic of Sri Lanka.*

C A (Writ) Application No. 462 / 2015

C A (Writ) Application No. 76 / 2012

C A (Writ) Application No. 83 / 2012

C A (Writ) Application No. 406 / 2012

Newtex (Pvt) Ltd,

No. 52/1,

Beddagana South,

Pitakotte.

PETITIONER

1. M D C Amaratunga,

Commissioner General of Labour,

Labour Secretariat,

Narahenpita,

Colombo 05.

2. A D K M Weerakkody,

Acting Assistant Commissioner of

Labour,

Legal Action Unit,

Department of Labour,

Labour Secretariat,

Narahenpita,

Colombo 05.

3. D Weerasinghe,

Assistant Commissioner of Labour,

Mahawa.

4. T M Seelawathie
5. P M Wimalawathie.
6. A M R Alagiyawanna.
7. H P Sugathapala.
8. H M A Herath.
9. E M S A Ekanayake.
10. S A R Samarasinghe.

RESPONDENTS

Before: A H M D Nawaz J

P. Padman Surasena J

Counsel: Nihal Jayawardhana PC for the Petitioner.

Niel Unamboowe PC ASG for 1st 2nd and 3rd Respondents.

Other Respondents are absent and unrepresented.

Argued on: 2017-03-07,

Decided on: 2017-08-08

JUDGMENT

P Padman Surasena J

When these cases were taken up for argument on 2017-03-07 the parties submitted that the issues to be decided by this court in the following cases namely,

C A (Writ) Application No. 462 / 2015

C A (Writ) Application No. 76 / 2012

C A (Writ) Application No. 83 / 2012

C A (Writ) Application No. 406 / 2012

are the same. They therefore agreed that it would be sufficient for this Court to pronounce one judgment in respect of all the above cases. Hence this judgment must apply to all the cases above referred to.

The Petitioner in his petition has stated inter alia that;

- I. Tri Star Apparel Exports (Private) Limited is a company engaged in the business of manufacturing garments and was operating its factory at Nikaweratiya,
- II. as said Tri Star Apparel Exports (Private) Limited was experiencing a severe financial crisis and was on the verge of closing down the factory, it negotiated with three companies namely Interlock Fashions Bibile Limited, North Western apparels (Pvt) Ltd. And Rasuki Apparels (Pvt) Ltd. to lease out its factory together with its equipment,
- III. the petitioner company (Newtex (Private) Limited) was incorporated as a limited liability company for the purpose of said taking over.

The lease agreement relevant to the above, has been produced marked **P 2**.

Annex A to **P 2** is a Labour Agreement entered into between Tri Star Apparel Exports (Private) Limited and the petitioner company [Newtex (Private) Limited]. Following clauses of the said Labour agreement would be of some significance to the issues in this case.

- I. "Newtex agrees that all employees shall be employed by Newtex on terms and conditions not less favourable than that which the said employees are currently being employed by Tri Star as at the date of execution of these presents".¹
- II. "Newtex agrees that in re-employing the employees Newtex recognizes the period of service the employees have served at Tri Star for the sole purpose of gratuity."²
- III. "Newtex agrees and undertakes to assume the total liability of the employees gratuity including any claims, costs, demands, expenses, fines or penalties in relation to the employees gratuity after 1st June 2007."³
- IV. "Newtex agrees to indemnify Tri Star against any claim, liability, cost, demands, expenses, fines or penalties accruing or accrued (including legal cost and expense) sustained or incurred by Tri Star in relation to any labour related matters with regard to the employees arising after the 1st June 2006."⁴

The petitioner in his petition has further stated;

¹ Clause 3.02.

² Clause 3.03.

³ Clause 3.05 (c).

⁴ Clause 5.

- I. that 4th – 9th Respondents appear to have made applications to the 3rd Respondent requesting the payment of gratuity on the basis that their employments had been terminated by the petitioner company⁵,
- II. that the 1st or the 3rd Respondents had not notified the petitioner about such applications⁶,
- III. that the petitioner was making payments of EPF on instalment basis in respect of several cases filed against it in the Magistrate's Court of Nikaweratiya⁷,
- IV. that it received certificates issued by the 2nd Respondent setting out details of compensation awarded to the 4th – 10th Respondents at the Magistrate's Court Nikaweratiya when the Petitioner's agent had gone to that Court for another case filed with regard to EPF dues⁸,
- V. that the 1st Respondent in calculating the liability of the petitioner in relation to the payment of gratuity, has not taken into consideration the period within which the petitioner actually operated the company in question⁹,

⁵ Paragraph 14 of the petition.

⁶ Paragraph 15 of the petition.

⁷ Paragraph 16 of the petition.

⁸ Paragraph 16 & 18 of the petition.

⁹ Paragraph 19 of the petition.

VI. that the Petitioner's registered address was at No. 394, Second Floor, Pannipitiya Road, Pelawatte, Battaramulla and thereafter the registered office was shifted to 108/A, 1/1, Maya Avenue, Colombo 6¹⁰.

It is the Petitioner's position that the 3rd Respondent had not made any attempt to serve notices at the registered office of the Petitioner to inform him about the inquiries conducted by him regarding the said payment of gratuity.

Thus the Petitioner complains that the above lapse resulted in an ex parte inquiry being conducted against him, by the 3rd Respondent.

It is on the above grounds that the petitioner in this application has prayed for a writ of Certiorari to quash the order/award of the 1st Respondent, set out in the certificate filed in the Magistrate's Court produced marked **P 3**. It is the position of the Petitioner that the said orders/awards are ultra vires, illegal and hence null and void due to the breach of rules of natural justice.

¹⁰ Paragraph 20 (ii) of the petition.

The Petitioner therefore has pleaded that it be quashed on the basis of that alleged error on the face of its record¹¹.

The above material show that the issue to be principally addressed by this Court is whether the 1st -3rd Respondents has breached the principles of rules of natural justice by not affording an opportunity for the Petitioner to participate at the said inquiry.

In order to address this issue it is necessary to consider the respective positions taken up by the parties with regard to the sending of notices. The position with regard to that, taken up by the Petitioner would be as follows.

- I. Although the said certificate and the journal entry contained the Petitioner's address as No. 52/1, Baddegana South, Pitakotte, the Petitioner never received any such notice with regard to the said inquiry conducted by the Department of Labour relating to the payment of gratuity to 4th – 10th Respondents¹².
- II. The Petitioner's registered address was at No. 394, Second floor, Pannipitiya Road, Pelawatte, Battaramulla and thereafter the

¹¹ Paragraph 21 of the petition.

¹² Paragraph 20 (i) of the petition.

registered office was shifted to 108/A, 1/1, Maya Avenue, Colombo

06¹³.

- III. The 3rd Respondent had not attempted to serve notices at the registered office of the petitioner¹⁴.
- IV. Two of the directors of the petitioner company are also directors of a company called North Western Apparels (Pvt) Ltd. Who presently operate from premises No. 52/1, Baddegana South, Pitakotte¹⁵.
- V. The petitioner never operated at the said address No. 52/1, Baddegana South, Pitakotte¹⁶.

The positions taken up by the 1st -3rd Respondents in this regard however are different. The following positions namely,

- I. that the petitioner was notified to attend an inquiry by letters dated 2009-07-31 and 2009-08-14 produced marked **1 R 2 (a)** and **1 R 2 (b)**.

¹³ Paragraph 20 (ii) of the petition.

¹⁴ Paragraph 20 (iii) of the petition.

¹⁵ Paragraph 20 (iv) of the petition.

¹⁶ Paragraph 20 (v) of the petition.

- II. that the petitioner defaulted attending the said inquiry and consequently was informed of the findings of the inquiry by letters dated 2010-03-02, 2012-02-08 and 2014-04-09 produced respectively marked as **1 R 3 (a)** , **1 R 3 (b)** , **1 R 3 (c)**,
- III. that the petitioner has categorically admitted the receipt of such-letters by his letter dated 2012-07-26 produced marked **1 R 4**.
- IV. that the petitioner has right through acted and conducted himself mala fide and with absolute disregard of law.
- V. that the petitioner on being informed about a possible action being taken in case he further defaults EPF payments had sought a period of two months to settle the said EPF dues by his letter dated 2012-07-13 produced marked **1 R 7**,

are worthwhile being highlighted as they shed a considerable light on the principle issue to be decided by this Court.

The two letters produced marked **1 R 2 (a)** and **1 R 2 (b)** are the letters by which the 1st -3rd Respondents claim to have notified the Petitioner to attend the said inquiry. These letters are dated 2009-07-31 and 2009-08-14 respectively and had both been addressed to නිව්ටෙක්ස් ආයතනය,

මගලේගම, නිකවැරටිය. According to the lease agreement marked **P 2**

the leasing of the factory was effective from 2006-06-01¹⁷. Petitioner has stated that he successfully operated the factory for 03 years until he was forced to close it around 2009-06-24¹⁸. According to paragraph 13 of the petition it was thereafter that Tri Star had taken over the factory and commenced its operations. Thus the Petitioner has not proved to the satisfaction of this Court that it's factory remained closed when the two notices produced marked **1 R 2 (a)** and **1 R 2 (b)** were sent by the 1st - 3rd Respondents to inform the Petitioner about the impugned inquiry. Indeed this Court has to note that the letter written by the Petitioner produced marked **1 R 7** also contains its factory at the address of Magallegama, Nikaweratiya. This letter is dated 2012-07-13. The reasonable inference that this Court could draw from these facts is that the said factory premises was not a premises which had been abandoned during the relevant period.

The veracity of the other positions taken up by the Petitioner becomes relevant for the decision regarding the truthfulness of his position that he

¹⁷ Clause 2.1 of **P 2**.

¹⁸ Paragraph 10 of the petition.

did not receive the said notices. Thus this Court would now turn to two other positions taken up by the Petitioner.

As has been mentioned above, it is the position of the Petitioner that he never operated at the address No. 52/1, Baddegana South, Pitakotte .

It is interesting to note that the address that the petitioner has opted to state in the caption of this application is No. 52/1, Baddegana South, Pitakotte. It is the same address mentioned in the proxy signed by the directors of the petitioner company. The question then arises as to why the Petitioner had chosen to mention a place as his address for the purpose of a Court case namely this application, when he himself claims that it is not an address he ever operated from.

Although it is the petitioner's claim that it never operated from the said address, it could be noted that the letter produced marked **1 R 4** also bears the address No. 52/1, Baddegana South, Pitakotte. That is a letter the petitioner has written to the 3rd Respondent on 2012-07-26. It is a clear indication that the Petitioner operated from the said address.

It must be noted that the notices informing the Petitioner regarding EPF contributions had also been sent by the 3rd Respondent. The said notices

produced marked **1 R 6 (b)** and **1 R 6 (c)** have been addressed to No. 52/1, Baddegana South, Pitakotte. These letters have been sent on 2012-06-27 and 2012-09-05 respectively. This Court has to note that the Petitioner had replied to the said notices by his letter addressed to the 3rd Respondent marked **1 R 7**, requesting more time to make the payment referred to in those notices. This letter had been written by the Petitioner on 2012-07-13. It is also interesting to note as has been mentioned before, that the letterhead of that letter states the address of the factory of the Petitioner as 'Magallegama, Nikaweratiya'.

In these circumstances the claim that the petitioner has never operated from that address cannot be a truthful position.

Further the Petitioner has stated in his petition that there had been a Korean Director in his company¹⁹. However the documents produced marked **1 R 1 (a)** and **1 R 1 (b)** shows that, that assertion is also not true.

Therefore this court is compelled to hold that the Petitioner has not been truthful in its assertions. It is the view of this Court that these false assertions vitiate the truthfulness of the positions taken up by the

¹⁹ Paragraph 12 of the petition.

Petitioner. This would be a serious blow to the credibility of the Petitioner's versions.

It would be appropriate to reproduce at this juncture the following extract from a judgment of Jayasuriya J in the case of Blanca Diamonds (Pvt) Ltd. Vs. Wilfred Van Els and two others²⁰.

" In filing the present application for discretionary relief in the Court of Appeal Registry, the petitioner company was under a duty to disclose, uberrima fides and disclose all material facts to this court for the purpose of this court arriving at correct adjudication on the issues arising upon this application. In the decision in Alphonso Appuhamy Vs. Hettiarachchi²¹, Justice Pathirana, in an erudite judgment, considered the landmark decisions on this province in English law and cited the decisions which laid down the principle that when a party is seeking discretionary relief from this Court upon an application for a writ of certiorari, he enters into a contractual obligation with the Court when he files in the Registry and in terms of that contractual obligation he is required to disclose uberrima fides and disclose all material facts fully and frankly to this Court.²² ...".

²⁰ 1997 (1) SLR 360.

²¹ 77 NLR 121.

²² at page 362.

Thus it is the view of this Court that the Petitioner is guilty of breach of uberrima fides as he has failed to divulge the truth.

Learned counsel for the Petitioner has drawn the attention of this Court to section 523 of the Companies Act No 07 of 2007 to argue that the way to give notice to a company is the way that section has set out. The segment in which section 523 is found in the Companies Act is the section dealing with application and reference to court. Since the proceedings impugned in this case is under the Termination of Workmen (Special Provisions) Act it should be the provisions of that Act which must prevail.

Section 18 of the Termination of Employment of Workman Act No. 45 of 1971 states that 'any notice which is required to be served on, or given personally to, such person; be deemed to have been duly served or given

- a) If it is left at the usual or last known place of abode or business of such person; or
- b) If it is sent to him by post in a registered letter addressed to the usual or last known place of abode or business of such person.

Therefore it is the view of this Court that the serving of notices in respect of any proceeding under the said Act must be governed by section 18 of the Termination of Workmen (Special Provisions) Act.

For the foregoing reasons it is the view of this court that there is no merit in this application and that the petitioner has not been truthful in its positions. In these circumstances we decide to dismiss this application with costs.

Application dismissed with costs.

JUDGE OF THE COURT OF APPEAL

A H M D Nawaz J

I agree,

JUDGE OF THE COURT OF APPEAL