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

In the matter of an Application for grant of mandates in the nature of Writs of Certiorari and Prohibition in terms of Article 140 of the Constitution of the Democratic Socialist Republic of Sri Lanka

CA WRIT 117/2013

Trelleborg Lanka (Pvt) Limited
Levin Drive
Sapugaskanda
Makola.

PETITIONER

Vs.

01. C.T. Janka Pushpakumara
No.123, Pamunuwila
Gonawila.

02. M.B. Kamal Weerasiri
No. 1/1, Sapugaskanda Road
Makola.

03. D.M.J. Gunasinghe
No.452/12, Makola North
Makola.

04. H.M. Jayathilake
No.292/2
Meegahawatte
Delgoda.

05. T.E. Santharajan
Labor Secretariat
Colombo 05.

06. V.B.P.K. Weerasinghe
Commissioner of Labor
Labor Secretariat
Colombo 05.

07. Hon. Minister of Labor
Labor Secretariat
Colombo 05.

08. Hon. Attorney General
Attorney General's Department
Colombo 12.

RESPONDENTS

Before: **Janak De Silva J.**

&

N. Bandula Karunarathna J.

Counsel: Vinodh Wickremasooriya for Petitioner

Milinda Gunatilake SDSG for Respondents.

Written Submissions: By the 5th – 8th Respondents on 23.10.2019

Reply Submissions of the Petitioner on 31.07.2019

Argued on: 01/02/2019

Judgment on: **16/11/2020**

N. Bandula Karunarathna J.

The Petitioner is an Incorporated Company who has made this application to quash by way of a Writ of Certiorari the Award made by the duly appointed Arbitrator, (5th Respondent) after hearing the parties on 18.01.2013. Further by way of a Writ of Prohibition the Petitioner seeks to restrain the Commissioner of Labour (6th Respondent) from instituting action to recover the purported monies due from the Petitioner to the 1-4th Respondents (Employees) by virtue of the Award dated 18.01.2013 made by the 5th Respondent (Arbitrator).

By the said Award (P3) the Arbitrator (5th Respondent) has awarded the following to the 1st - 4th Respondents.

i. 1'' Respondent a sum of Rs:128,404/20,

ii. 2nd Respondent a sum of Rs:90,713/50,

iii. 3rd Respondent a sum of Rs:61,485/50 and

iv. 4th Respondent sum of Rs.86,387/= as monies due

By this application the Petitioner seeks Writs of Certiorari and Prohibition against the arbitral Award. (P3)

The matters referred to arbitration are set out below.

01. Whether the below mentioned employees who retired under the voluntary compensation scheme on 30/06/2009 are entitled for the bonus payment for year 2009 for services rendered from 01/01/2009 to 30/03/2009?

    Mr. Janaka Pushpakumara, Mr. M.B. Kamal Weerasiri, Mr. D.M.J. Gunasinghe and Mr. H.M. Jayathilake

02. The cost of living allowance, a non- recurrent expenditure received by the employees for the previous month that the allowance received on 30/06/2009 at the retirement date under the voluntary compensation scheme was the allowance for the month of May and therefore, they are entitled for the said allowance for the month of June.

    Are the entitled? If so, to what amount?

03. Whether date of assumption of duties and the period of service stated by Mr. C.T. Janaka Pushpakumara can be accepted?

    If so, what relief he is entitled?

04. Whether it is legal on the part of the company to deprive the employees of their overtime payments for work done on Sundays in year 2006?

    If it is illegal to what benefits the employees are entitled?

The misconceived contention of the Petitioner is that the said Award dated 18.01.2014 (P3) granting Statutory dues and overtime due emoluments are contrary to the evidence led at the Inquiry and therefore the said award is arbitrary, unreasonable and cannot be justified upon any objective parity of reasoning and therefore the said award (P3) contains errors on the face of the record, illegal, and null and void and of no legal force or avail in law.

Further amongst other things the position taken by the Petitioner in his Petition paragraph 20 is that the:

"20 (a) The 5th Respondent has not properly evaluated the evidence led at the inquiry which clearly shows that the 1st - 4th Respondents were represented by their Trade Union when agreeing to the compensation offered by the Petitioner Company"

"20(b) The 5th Respondent failed to see that the 1st - 4th Respondents themselves took part in the discussions on the VRS with the management of the Petitioner Company

The Petitioner states that the 5th Respondent Arbitrator had failed to properly evaluate the evidence placed by the Petitioner regarding the simple fact that all statutory dues [the subject matter of the reference] the employees were entitled up to the time of their voluntary retirement scheme (VRS) was incorporated in the 25% ex-gratia payment. That was offered with the VRS [A1a]. Thus, the Petitioner denies that its applications to Court for the Writs of Certiorari and Prohibition are misconceived contentions as alleged by the Respondents.

The Petitioner states that the calculations set out by the Respondents clearly and without ambiguity shows that all statutory payments and the bonus due to each employee is more than adequately covered by the said ex-gratia. When deducting the amounts awarded by the 5th Respondent from the ex-gratia payment, all four employees are left with a balance as well.

the Petitioner further states that the reasoning given in the Respondents regarding the fact that, there was no qualm for the Trade Union regarding the statutory dues, the Petitioner states that the 5th Respondent should have taken into consideration the fact that the best witness for the employee Respondents to have called on their behalf was a representative of the Trade Union, which negotiated the VRS together with the 1st, 2nd and 3rd Respondent, who could have fairly and squarely settled the issue that was before the Arbitrator.

The Petitioner states that the employees, knowing very well that a Trade Union will not be called as a witness to an Employer in an Industrial Dispute, the 1st to 4th Respondents deliberately refrained from calling a witness from the said Union Tribunal as to why they were not calling a witness from the Trade Union.

The Petitioner states that there was evidence beyond a reasonable doubt that the 1st Respondent commenced his employment with the Petitioner Company on 1st January 1990, by way of documentary evidence, that is the letter of appointment as well as the 1st Respondents own letter A10[a] which he himself given as 01-01-1990. Despite the aforementioned overwhelming evidence on the 1st Respondents date of employment, the 5th Respondent, without analyzing the aforesaid two salient factors proceeds to hold that the 1st Respondent commenced his employment on or about 04-04-1989.

The 5tht - 8th Respondents have vehemently denied the position taken by the Petitioner. The Petitioner Company had introduced a Voluntary Scheme of Retirement set out in Al (a). The 1st - 4th Respondents amongst other employees had opted to accept the proposal and volunteered to go on retirement having considered the offer.

It is on record that at the discussion held on or about 22.02.2009 before the Labour Commissioner 05th Respondent informed that he commenced his employment on or about 04.02.1989 as a casual

employee and he was considered as entitled for Gratuity from 04.02.1989. Moreover, the 05th Respondent has considered the evidence given by the 04th Respondent at the Inquiry before the Arbitrator on or about 10.08.2012, 27.08.2012 and 21.09.2012 stating in his evidence confirming that he was working in the petitioner company since 04.02.1989.

"20 (C) ex-gratia payment of 25% given to all the respondents covered all the statutory payments also that were due to the 1st-4th Respondents.

Moreover Al (a) has been issued not only in respect of the 1st - 4th Respondents but in respect of all the other employees. Further, the aspects of Cost of Living and other Statutory Payments to be made by the Petitioner has been discussed before the Commissioner of Labour. The Learned Arbitrator has considered the contents of all the documents furnished by the parties and the contents of the Statement of the Employees dated 16.11.2011 of Case bearing No. A3409 and the Employers Statement dated 25.11.2011.

"20(d) The ex-gratia payment was in addition to the compensation that was awarded to the Respondents for their years of service,

The paragraph 20 (d) of the Petition clearly states that "The ex-gratia payment was in addition to the compensation that was awarded to the respondents for their years of service.

The Petitioner states that the 1st to the 4th Respondents employees, who saw a flaw in the settlements entered into before the Commissioner of Labour which was the fact that the Company had failed to mention that the 25% *ex gratia* payment included the statutory dues and the bonus, this complaint was made with the sole intention of unjustly enriching themselves at the expense of the Petitioner.

The Petitioner further states that the conduct of the employee Respondents by purposely refraining from calling the Trade Union and the Commissioner of Labour as a witness shows that these two witnesses would have exposed their false premise of the fact that the 25% *ex gratia* payment did not cover the statutory dues as well the bonus component.

The Petitioners own interpretation of the additional payment for the employee's years of service cannot be termed in any other manner or attributed to cover any other statutory payment due to the employees by the employer.

Further Mr. Dehiwala Liyanage Piyatissa the Petitioners Company Director of Human Resources at the Inquiry of 23.07.2012 has specifically admitted the statutory payments due to the 1st- 4th Respondents. Moreover, in terms of clauses 4.4, 4.5 and 4.7 of the agreement entered between employees and the Petitioner (6R1), 1st to 4th Respondents are entitled to over time, a non-recurring cost of living allowance and bonus payments.

"20(e) The 5th Respondent has failed to give any plausible reason as to how he came to the conclusion that the 1st Respondent's service with the Petitioner Company was before 01.01.1990 when the appointment letter marked as R3 clearly shows that his employment commenced from 01.01.1990 and the evidence of the Petitioners witness on this matter,

The Petitioner emphasizes that what the Arbitrator failed to take into consideration was the fact that, out of 66 employees who took the VRS, only 4 employees decided to make a complaint. The Arbitrator also failed to take into consideration the fact that, if the allegations of the 1st to 4th Respondents were true, the Trade Union would have been the first to take up this issue as they represented all 66 of the employees who took the VRS.

The Petitioner strongly denies the fact that the Award marked P3 is in accordance with the Principles of Natural Justice, when the 5th Respondent had completely failed to properly evaluate and analyze the oral as well as the documentary evidence that was placed before him, and also the contradictory evidence of the employee Respondents, which should not have been relied upon by the Learned Arbitrator.

the 5th Respondent in his award at page 3 has given adequate and cogent reasons for the determination that the 1st Respondent Pushpakumara was employed by Petitioner before 01.01.1990. Further the evidence of the Petitioner at pages 384-394 clearly demonstrate the service period of the 1st Respondent and the witness has admitted that it is the responsibility of the petitioner to issue the identity card and the said identity card has been issued by the Petitioner although in the personal file maintained by the petitioner company only the letter of appointment R3 is available and nothing issued prior to 01.01.1990 is filed. The 5th Respondent has taken into consideration the evidence elicited from the witness of the Petitioner and has made his order or award accordingly.

"20(f) The 5th Respondent also failed to take into consideration that the 1st Respondent never brought the question of his years of service even at the time of computing the compensation and also when he made his first complaint to the Commissioner of Labour by A10(a),

The terms of reference dated 01.09.2011 clause 3 at page 3 clearly indicate the question to be answered in respect of the 1st Respondents years of service. Therefore, the Petitioner having agreed and accepted the said term of reference is estopped from contesting the said issue. If the Petitioner had any objections in regard to the term of reference (in regard to the said query pertaining to the 1st Respondents years of service) then he should have had objected informing the 5th Respondent that it is not a matter to be determined by the Arbitrator. Moreover, the Statutory Payments due to be paid cannot be circumvented or avoided to be paid by entering into any agreement or Memorandum of Understanding.

"20(g) The 5th Respondent failed to take into consideration that the 1st — 4th Respondents are attempting to unjustly enrich themselves at the expense of the Petitioner Company".

This proposition is to be viewed in the reverse order. The 1st — 4th" Respondents are employees who have served the Petitioner Company for a long period of time and for their services rendered are statutorily entitled for the emoluments and payments. The Petitioner Company is not in a position to avoid paying overtime benefits and cost of living and other payments prescribed by law. Hence any payment due by virtue of the law for the services rendered by the employees cannot be denied nor considered as an additional payment. Therefore, it is the Petitioner Company that by denying the due statutory payment to the retiring employees under VRS is attempting to reap the benefits of retaining the sums of money legally due to the 1st- 4th Respondents and thus trying to procure an undue enrichment. Accordingly, the 5th Respondent has taken into consideration all aspects of the dispute referred to him and has made a just and equitable award.

Moreover, the A/3194 award was made on 2003.01.18 (P3) following the principles of natural justice after hearing both parties and in terms of law and being fair and justifiable. Accordingly, the award was published in Extraordinary Gazette No 1798/63, dated 2013.02.22. (6R2).

The Respondents submit that the Voluntary Retirement Scheme (VRS) cannot in law take away the statutory obligations of the Petitioner to make specific payments to its employees as mandated by statute. The VRS is at page 358 of the Brief marked A1 (a). Item (2) on page 1 provides that in addition to the monies paid in terms of the formula approved by the Department of Labour, a further sum will be paid to the employees accepting the VRS. The additional amount is computed at 25% of the payment made according to the Labour Department Formula.

The Respondents state that the Collective Agreement is marked as A5. Clause, 4.7 of the Collective Agreement deals with Ex-gratia payments. These payments have already been earned by the employees at the point of retiring under the VRS. There is nothing in. A1 9a) [the VRS] to say that the ex-gratia payment in lieu of benefits already earned. The employees have a statutory right to their entitlement. Under a Collective Agreement in circumstances where there is no express waiver by the employees in the VRS of such entitlements, in this case the ex-gratia payments remain payable to the employees.

The 5th Respondents decision with regard to the 1st dispute is reasonable and supported by reasons referable to the material submitted to him in the course of the Arbitration.

The second dispute submitted for Arbitration was;

> "The Cost of Living allowance, a non-recurrent expenditure received by the employees for the previous month that the allowance received on30/06/2009 at the retirement date under the voluntary compensation scheme was the allowance for the month of May and therefore,

they are entitled for the allowance for the month of June. Are they entitled? If so, to what amount?"

The 4th Respondents Arbitration has based his decision on this matter on a answer given by the representative of the Petitioner. This is reproduced on the 3rd page column 1 of the Arbitral Award.

"එසේම විසදිය යුතු (2) වන කරුණ වන්නේ පුනරාවර්තන නොවන ජීවන වියදම් දීමනාව සම්බන්ධවයි. මේ සම්බන්ධයෙන් සලකා බැලීමේ දී 2 වන පාර්ශවයේ සාක්ෂිකරු අධිකරණයෙන් අසන ලද ප්‍රශ්න සදහා මෙසේ පිළිතුරු ලබා දී ඇත.

ප්‍ර කෙටියෙන් කියනවා නම් පළවෙනි පාර්ශවකරුවන් වී ඉන්න 04 දෙනාට පුනරාවර්තන නොවන ජීවන වියදම් පාරිතෝෂික හිමිකම් තිබෙනවාද?

උ තිබෙනවා".

The Arbitrator was also required to determine;

"Whether it is legal on the part of the Company to deprive the employees of their overtime payments for work done on Sundays in year 2006. If it is illegal to what benefits the employees are entitled?"

The Respondents state that these sums are payable to the employees according to the relevant wages Board-Rubber (including Tyre Manufacture and rebuilding) plastic and Petroleum resin Products Manufacturing Trade. The 4th Respondent has set down 9 reasons in the Arbitral Award (P3) on the 3rd page.

The Petitioners application should be dismissed after taking into consideration the following:

i. This application is misconceived;
ii. Petitioner has misrepresented facts;
iii. The application is frivolous and vexatious;
iv. The petitioner has not come to Court with clean hands;
v. The Petitioner is not entitled to the relief prayed for.

The Petitioner's representative answering a question put to him by the 4th Respondent has expressly admitted that the VRS does not state that they will not be paid for work done on Sundays.

In the circumstances, the decision of the 4th Respondent in relation to this dispute is supported by reasons and material placed before the 4th Respondent at the Arbitration.

The 3rd dispute submitted to the 4th Respondent relates only to the 1st Respondent.

"Whether date of assumption of duties and the period of service stated by Mr. C.T. Janaka Pushpakumara can be accepted? If so, what relief he is entitled?"

The Respondents state that in relation to the years of service, of the 1st Respondent, the 4th Respondent Arbitrator has observed that although a letter of appointment was given to the 1st Respondent only on 01.01.1990 (R3), in terms of the documents A2 (e) andA2 (f) the 1st Respondent had actually served the company from 17.03.1989. A2 (e) in particular, is a card issued to the 1st Respondent by the Petitioner when he commenced work on 17.03.1989 on a temporary basis.

It is my opinion that in a Writ Application, what is subject to scrutiny of Court is whether the decision maker acted in excess of the powers conferred on him by law. The allegations in paragraph 20 (a) to 20 (b) are limited to factual determinations in P3 which are allegedly wrong.

It is trite law that in a Writ Application, a Court is not concerned with whether the decision is right or wrong. The question which Court will consider if whether the decision is legal or illegal.

As evident from the paragraph 20 of the Petition and the Petitioners Written Submissions, what is being assailed are only the factual decisions made by the Arbitrator. This may be done in an Appeal, but not in a Writ Application. Accordingly, this Writ Application cannot be maintained.
It is pertinent to note that the Petitioners do not allege that;

a. The 5th Respondent went beyond the scope of the matters referred to Arbitration; or that
b. The Arbitral award is ultra vires; or that
c. That the Arbitral award is so irrational that no reasonable man could have wished that conclusion;
d. There is a lack of a fair hearing or a failure of natural justice.

Due to the aforementioned reasons, it is my standpoint that this writ application cannot be maintained and this application is hereby dismissed with costs.

Judge of the Court of Appeal

Janak De Silva, J

I agree.

Judge of the Court of Appeal