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

In the matter of an application under Article 140 of the Constitution for mandates in the nature of a Writ of Certiorari and/or Prohibition.

Ceylinco General Insurance Limited.
"Ceylinco House", No.69,
Janadhipathi Mawatha,
Colombo 01.

PETITIONER

C.A. Case No. WRT-0095/20

Vs

1. Commissioner General of Labour.
   Labour Secretariat,
   No. 41, Kirula Road,
   Colombo 05.

2. P. K. D. H. Munasinghe.
   Assistant Commissioner General of Labour,
   Colombo South District Labour Office,
   6th Floor, Labour Secretariat,
   No. 41, Kirula Road,
   Colombo 05.

3. I. C. Gamage.
   Labour Officer,
   Colombo South District Labour Office,
   6th Floor, Labour Secretariat,
   No. 41, Kirula Road,
   Colombo 05.

4. Wasana Samangi Mavananahewa.
   No. 9/14,
   Vilegoda,
   Ambalangoda.

5. G. V. Vasantha Ruhunusiri
   Chief Public Administration Assistant,
   Colombo South District Labour Office,
   6th Floor,
   Labour Secretariat,
   No. 41, Kirula Road,
   Colombo 05.

RESPONDENTS

BEFORE : **M. T. MOHAMMED LAFFAR, J**

WICKUM A. KALUARACHCHI, J

COUNSEL : Shehan Gunawardena with Dhammika Wickramasinghe for the Petitioner.

M. Jayasinghe, DSG with M. Amarasinghe SC, for the Respondents.

WRITTEN SUBMISSIONS

TENDERED ON : 17.11.2023 (On behalf of the Petitioners)

06.11.2023 (On behalf of the 1st 2nd 3rd and 5th Respondents)

DECIDED ON : 12.12.2023

WICKUM A. KALUARACHCHI, J.

The petitioner has filed this application seeking a writ of certiorari quashing the directive/certificate dated 06.03.2020 (P-21) issued from the Colombo South District Labour Office, signed by the 2nd respondent, directing the petitioner to pay a sum of Rs. 241,150/- as gratuity to the

4th respondent. The petitioner also seeks a writ of prohibition preventing the 1st to 3rd and 5th respondents from inquiring into the complaint made by the 4th respondent bearing reference number CS/COA/E/02/368/18.

When this application was taken up for hearing, the learned Counsel for the petitioner and the learned Deputy Solicitor General appearing for the 1st to 3rd and 5th respondents agreed to dispose the matter by way of written submissions. Accordingly, both parties have tendered the same. The 4th respondent was not present and she was not represented.

According to the petitioner company, on or about January 2013, it was found that the 4th respondent had misappropriated a sum of Rs. 4,353,464/- from the funds of the company. P-09 (marked as P-10 as well) is the undated letter of resignation of the 4th respondent. In P-09, she stated that she resigns from the post of Assistant Accountant as she misappropriated the money by using a bogus cheque. Therefore, the 4th respondent admitted the guilt of misappropriating the funds of the petitioner company and informed that she resigns from the company for the said reason of misappropriation. In the letter marked P-8, she informed further that from the misappropriated money, Rs.200,000/- has been deposited to the Bank account of the petitioner company and the balance of Rs.250,000/- would be deposited in the coming week. The petitioner, in its letter dated 13.11.2015 (P-12), accepted the resignation of the 4th respondent and informed her to settle the festival loan and sundry loan obtained by her. The petitioner states that a sum of Rs. 273,833.30 was due to the petitioner from the 4th respondent, and she requested by way of the letter P-13 (the date of the letter can be seen as September 2018) to deduct the said sum of Rs. 273,833.30 from the gratuity entitlement of the 4th respondent. The petitioner further stated that even though a sum of Rs. 266,797/- was due to the petitioner from the 4th respondent, the petitioner did not pursue the recovery of that payment.

Thereafter, the petitioner received a letter dated 08.10.2018 from the Assistant Commissioner of Labour of the Colombo South District Labour office informing the petitioner that the 4th respondent has lodged a complaint against the petitioner with regard to the non-payment of gratuity.

According to the petitioner, the petitioner company attended the inquiry and informed the 3rd respondent that the 4th respondent had forfeited her gratuity entitlement, but the 3rd respondent disregarded the submissions made on behalf of the petitioner. The petitioner stated further that the petitioner company complained to the 2nd respondent and requested that the inquiry be conducted before a different Labour officer but the same officer continued with the inquiry. At the conclusion of the inquiry, the 2nd respondent issued the certificate marked P-21 directing the petitioner to pay a sum of Rs.241,150/- (Rs.185,000/- as gratuity entitlement + Rs.55,650/- as a surcharge for the delay) to the 4th respondent.

In the statement of objections, the 1st, 2nd, 3rd and 5th respondents admit the facts that the 4th respondent ceased to report to work from 11th January 2013, she misappropriated Rs.4,353,464/- from the petitioner company and repaid Rs.4,175,000/-. Their position was that there was no disciplinary inquiry against the 4th respondent, and the employment of the 4th respondent ceased as a consequence of her resignation and not as a result of the termination of her services by the petitioner on disciplinary grounds. Thus, the argument stated in the written submission of the aforesaid respondents was that the petitioner has no basis to invoke Section 13 of the Payment of Gratuity Act.

The contention on behalf of the 1st to 3rd and 5th respondents was that even though the 4th respondent had requested her dues to be deducted from the gratuity entitlement, a statutory payment cannot be deducted in

this manner even with the consent of the recipient, unless expressly permitted by law. Therefore, the aforesaid respondents submitted that the certificate issued by the 2nd respondent is correct in law and urged the petitioner's application to be dismissed.

The main issue to be determined first in this matter is whether the Commissioner of Labour has the jurisdiction to make the determination contained in P-21. If the Commissioner of Labour has jurisdiction to inquire into this issue only, it becomes necessary to address the other issues raised on behalf of both parties.

The contention of the learned Counsel for the petitioner was that 1st, 2nd or 3rd respondents have no jurisdiction to consider the issue of whether forfeiture of gratuity is correctly done and the jurisdiction has been vested with the Labour Tribunal by the amendment introduced to the Payment of Gratuity Act No. 12 of 1983 (as amended by Acts No. 41 of 1990 and No. 62 of 1992).

The contention of the learned Counsel for the 1st to 3rd and 5th respondents was that Section 13 of the Payment of Gratuity Act has no application to the payment of gratuity in respect of the 4th respondent because Section 13 applies when an employee's services were terminated by the employer on disciplinary grounds and not when an employee has resigned from employment as in this case.

Disregarding the objection taken by the petitioner, the 3rd respondent, the Labour Officer continued with the inquiry and determination was made on the basis that he has jurisdiction to inquire and determine this matter as there was no termination of employment of the 4th respondent.

Section 13 of the Payment of Gratuity Act reads as follows:

> *Any workman, to whom a gratuity is payable under Part II of this Act and, whose services have been terminated for reasons of fraud, misappropriation of funds of the employer, willful damage to property of the employer, or causing the loss of goods, articles or property of the employer, shall forfeit such gratuity to the extent of the damage or loss caused by him.*

In the case of ***M.A. Lanka (Pte.) Ltd vs. Commissioner General of Labour and others*** – C.A. (Writ) Appl. No. 387/2013, decided on 21.11.2017, jurisdiction of the Commissioner of Labour and the Labour Tribunal in respect of Section 13 has been clearly distinguished as follows:

> "It all boils down that the Payment of Gratuity Act, No. 12 of 1983 applies to an industry that has employed 15 or more employees. But even in such a situation, if there is a forfeiture of gratuity on the grounds set out in Section 13 of the Act, the correctness of that decision goes before the Labour Tribunal for a legal appraisal. It is only when there is an Industry having 15 or more workmen but there is no allegation of fraud or misappropriation as set out in Section 13, the Commissioner gets jurisdiction to go into the question of gratuity."

The learned Counsel for the respondents stated that *M.A. Lanka case* had been wrongly decided. The learned Counsel further stated in his written submission how this Court of Appeal judgment should be corrected. He has stated that it should be corrected as follows;

> "*Where there is an allegation of fraud or misappropriation in terms of Section 13, and where the workman's services have been terminated by reason of such fraud or misappropriation, the Labour Tribunal will have jurisdiction.*"

It is to be noted that a divisional bench of this Court or the Supreme Court has not decided that the aforesaid Court of Appeal judgment is wrong. The learned Counsel for the respondents states that it is wrongly decided. Since it is a judgment of the Court of Appeal and has no binding effect on this bench, I wish to consider the said argument of the learned Counsel for the respondents.

The learned Counsel suggests to correct the aforesaid judgment to limit the jurisdiction of the Labour Tribunal only to the cases where workman's services have been terminated due to fraud or misappropriation, enabling disputes in other cases to be determined and inquired by the Commissioner of Labour.

Now, I proceed to consider whether the suggested correction is in accordance with the provisions of Law and whether there is any reason to take a different view from the said Court of Appeal decision in respect of the Labour Commissioner's jurisdiction and the jurisdiction of the Labour Tribunal.

Jurisdiction of the Labour Tribunal in respect of payment of gratuity is defined in Section 31 of the Industrial Disputes Act. The relevant portion of Section 31B (1) of the Act is reproduced below;

> *31B(1) A workman or a trade union on behalf of a workman who is a member of that union, may make an application in writing to labour tribunal for relief or redress in respect of any of the following matters:- (See section 7 of Act No. 32 of 1990 relating to pending actions (set out in Annexure to this Chapter). See also Act No. 19 of 1990 in this connection.) (a)…*
>
> *(b) …*

(c) the question whether the forfeiture of a gratuity in terms of the Payment of Gratuity Act, 1983 has been correctly made in terms of that Act,
(d)…

According to Section 31B(1)(c), the jurisdiction to inquire whether the decision of forfeiture of the gratuity has been made correctly is vested with the Labour Tribunal. His Lordship Justice Nawaz (as his lordship then was), in *M.A. Lanka case* has carefully considered the legislative history in respect of the Payment of Gratuity Act, analyzed all relevant sections and concluded if there is a forfeiture of gratuity on the grounds set out in Section 13 of the Act, the decision goes before the Labour Tribunal for a legal appraisal to decide its correctness. In addition, it was decided that it is only when there is an industry having 15 or more workmen but there is no allegation of fraud or misappropriation as set out in Section 13, the Commissioner gets jurisdiction to go into the question of gratuity.

Section 31B(1)(c) of the Industrial Disputes Act confers jurisdiction to the Labour Tribunal when there is a question whether the forfeiture of a gratuity in terms of the Payment of Gratuity Act has been correctly made. It is immaterial whether the employee's service was terminated by the employer or employee resigned from the employment. When the gratuity is forfeited by the employer, only the Labour Tribunal has the jurisdiction to determine whether the forfeiture had been correctly made. Hence, limiting the jurisdiction of the Labour Tribunal to the cases where the employee's services have been terminated by reason of such fraud or misappropriation as suggested by the learned Counsel for the respondents is contrary to Section 31B(1)(c) of the Industrial Disputes Act. Hence, the contention of the learned Counsel for the 1st 2nd 3rd and 5th respondents that the *M.A. Lanka case* has been wrongly decided is devoid of merit. I totally agree with the findings of *M.A. Lanka* case.

In addition, it must be noted that the basis on which the 3rd respondent came to the decision that he has jurisdiction is also incorrect because in the case of ***A Baur and Company Limited Vs. Commissioner of Labour and others*** – (2012) 1 Sri L.R. 379 (at page 384) three ways of lawfully terminating employment have been set out in the following manner;

'In view of the above provisions a lawful termination of an employment of an employee takes effect:

1. With the prior consent in writing of the workmen, e.g., permission of a contract of employment, voluntary retirement or **resignation submitted by the employee.**
2. With the prior written approval of the Commissioner, e.g., permission could be obtained from the Commissioner for retrenchment of employees or closure of the business.
3. As a punishment imposed by way of disciplinary action.
   (Emphasis added)

According to the aforesaid observation made in the *Baur case*, when the employee submits resignation that is also a way of termination of employment. So, the 3rd respondent cannot inquire and determine this issue stating that he has jurisdiction to do so, as there was no termination of employment.

According to the *M.A. Lanka* decision, when there is no allegation of fraud or misappropriation only, the Commissioner of Labour gets jurisdiction to go into the question of gratuity. When there is a forfeiture of gratuity on the grounds set out in Section 13 of the Act, the jurisdiction to determine the correctness of the decision is vested with the Labour Tribunal. In the case at hand, admittedly, the 4th respondent misappropriated the funds of the petitioner company. No disciplinary inquiry was needed to find whether she is guilty of misappropriation, because the 4th respondent herself admitted her guilt of misappropriating company funds by her

resignation letter marked P-9 written in her own handwriting. According to the 4th respondent, the very reason for resigning from the petitioner company was misappropriating company funds by using a bogus cheque. Apart from that, the 4th respondent has written the letter P-7 expressing her consent to pay back any amount to the company if it is found in the audit that she is liable to pay such amount. In letter P-7, the 4th respondent stated that she will resign from the company because the wrong that she has done to the company cannot be rectified. In addition, in the letter P-13, the 4th respondent informed the General Manager of the petitioner company to deduct from her gratuity entitlement, the festival loan and the sundry loan that she had obtained. Accordingly, the petitioner forfeited 4th respondent's gratuity as it was apparent that the 4th respondent has misappropriated funds of the petitioner. Misappropriation is a ground for forfeiting gratuity under Section 13 of the Payment of Gratuity Act. One of the arguments raised by the learned Counsel for the respondents was that even with the consent of the employee, statutory entitlement of gratuity cannot be deducted. That argument could be considered, however, not by the 3rd respondent but by the Labour Tribunal because, the jurisdiction to decide the correctness of forfeiture of gratuity is vested only with the Labour Tribunal. Therefore, the 3rd respondent's decision to continue with the inquiry and his consequent determination were made without jurisdiction.

The following observation made in *M.A. Lanka* case is also equally important in determining the case at hand:

> "In fact, what is necessary for purposes of the Commissioner of Labour to ascertain whether he has jurisdiction or not is some kind of evidence whether the services of the workman have been terminated in terms of Section 13 for reasons of fraud, misappropriation of funds of the employer, willful damage to property of the employer, or causing the loss of goods, article of

> property of the employer. If that evidence is manifest or evident to the Commissioner of Labour upon a facial examination of available documents, it is at this stage that the Commissioner of Labour would lose *seisin* of the matter. Merely because an employer states before the Commissioner that he has effected a Section 13 forfeiture when an employee has complained against non–payment of gratuity, it doesn't automatically follow that the Commissioner should stay his hand. It is open to the Commissioner to ascertain the genuineness of the claim of the employer that he has in fact effected a forfeiture for the reasons set out in Section 13 of the Payment of Gratuity Act."

Hence, it is manifestly clear that when it is evident to the Commissioner of Labour upon a facial examination that the service had been terminated in terms of Section 13 of the Payment of Gratuity Act for fraud or misappropriation, the Commissioner of Labour loses jurisdiction of the matter. There cannot be any other manifest evidence of misappropriation than the 4th respondent's admission of guilt for misappropriating the funds of the petitioner. When the misappropriation is manifest or evident and the forfeiture is done as a result, the Commissioner of Labour has no authority to continue with the inquiry on the ground that there was no termination of employment. As explained previously, the question of whether the forfeiture of gratuity in terms of the Payment of Gratuity Act is correctly made in terms of the Act is a matter to be considered by the Labour Tribunal. Therefore, the determination made by the 3rd respondent, representing the Commissioner of Labour is *Ultra Vires.*

As stated previously, even though it was manifestly clear to the 3rd respondent that the petitioner forfeitured the gratuity on the admitted ground of misappropriation of funds, he continued and determined the matter claiming that he has the authority to do so because there was no

termination of employment of the 4th respondent. As stated above, in the case of *A Baur and Company Limited Vs. Commissioner of Labour and others* it was observed that the resignation submitted by the employee is also one of the modes of a lawful termination of employment. Apart from that, the following portion of the aforesaid *Baur case* clearly demonstrates that irrespective of whether it was a resignation or a termination otherwise, the 3rd respondent had no authority to determine this matter because determining whether Section 13 was correctly invoked or not is a matter for the Labour Tribunal.

The relevant portion of the Baur case reads as follows;

> "Whether the employer invokes Section 13 correctly or erroneously, or whether he was entitled to invoke Section 13 or was disentitled to do so on the facts of the case, or whether the ingredients of Section 13 were satisfied or not are all matters which go to determining "the question whether the forfeiture of gratuity has been correctly made" in terms of the Gratuity Act Determining this issue is solely vested with the Labour Tribunal under Section 31B(c) of the Industrial Disputes Act."

Therefore, according to the circumstances of the case at hand, it was not within the authority of the 3rd respondent to decide whether Section 13 is applicable to the issue or not. Hence, I hold that holding an inquiry and determining the matter by the 3rd respondent has been done without legal authority. Upon his determination, issuing the certificate marked P-21 on behalf of the 1st respondent has been done by the 2nd respondent without legal authority. Hence, the said determination and the certificate issued thereupon are *Ultra Vires* and must be quashed.

Accordingly, a Writ of Certiorari and a Writ of Prohibition, as prayed for in the Prayer (e) and (f) of the petition are issued. The first, second, and third respondents should pay Rs.50,000/- to the petitioner.

Application allowed.

JUDGE OF THE COURT OF APPEAL

M. T. Mohammed Laffar, J
I agree.

JUDGE OF THE COURT OF APPEAL