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 a Writ of Certiorari and Prohibition under and in terms of Article 140 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

C. G. V. Anthony & Sons (PVT) Ltd.
No. 157,
Muthuwella Mawatha,
Colombo 15.

PETITIONER

C.A. Case No. WRT-564/23 **Vs**

1. B. K. Prabath Chandrakeerthi.
   Commissioner General of Labour,
   Labour Secretariat,
   P.O. Box. 41, Colombo 5.

2. D. A. S. Wijesundara.
   Assistant Commissioner of Labour,
   Colombo North District Labour Office,
   4th Floor, Labour Office,
   Colombo 05.

3. N. M. Y. Thushari.
   Assistant Commissioner of Labour,
   Western Zone III, (Presently)
   Commissioner of Labour,
   The Women's and Children's Division,
   Labour Department,
   Colombo 05.

4. Priyanka Nilmini Perera.
   No.103/A, Nagahawela,
   Kottikawatta.

5. Registrar.
   Magistrate Court,
   Colombo 12.

6. Hon. Attorney General,
   Attorney Generals Department,
   Colombo 12.

RESPONDENTS

BEFORE : M. T. MOHAMMED LAFFAR, J

WICKUM A. KALUARACHCHI, J

COUNSEL : Saliya Pieris, PC, with Rasika Dissanayake and Geeth Karunarathne for the Petitioner, instructed by Bhagya Ayeshani Pieris.

N. Kahawita, SC, for the 1st to 3rd and 6th Respondents.

SUPPORTED ON : 24.10.2023

DECIDED ON : 29.11.2023

ORDER

WICKUM A. KALUARACHCHI, J.

On the complaint made by the 4th respondent to the Department of Labour for non-payment of gratuity, the 2nd respondent has conducted an inquiry. In the inquiry, the petitioner company took up the position that due to the fraudulent actions and financial losses caused by the 4th respondent, the gratuity that had to be paid to the 4th respondent was deemed to be forfeited under and in terms of Section 13 of the Payment of Gratuity Act. Accordingly, the petitioner company states that there is no liability for the company to make any payment to the 4th respondent. However, after the inquiry, the 2nd respondent issued two notices marked P-17 and P-18

directing the petitioner company to make the gratuity payment. The petitioner has informed the Department of Labour that Section 13 of the Payment of Gratuity Act shall apply in deciding the gratuity payments for the 4th respondent and accordingly, her gratuity had been forfeited. However, after issuance of the notice marked P-19, the 3rd respondent issued the certificate dated 27.05.2020 notifying the petitioner to make a gratuity payment of Rs.1,602,250/- to the 4th respondent and then filed the application bearing No. 39376/05/20 in the Magistrate Court of Colombo to recover the said amount of gratuity from the petitioner company. The statement of objections and the counter objections were filed in the Magistrate Court, parties were allowed to file written submissions and the learned Magistrate made an order on 31.08.2023 to pay the amount mentioned in the said certificate marked X-1.

The petitioner has filed this writ application seeking to quash the certificate issued by the 3rd respondent marked X-1, quash the notice issued by the 2nd respondent marked P-19, prevent one or more or all the respondents from taking any further steps to enforce the learned Magistrate's order marked X-2 and to quash the entire proceedings of the Magistrate Court case bearing No. 39376/05/20 marked X.

In addition, the petitioner seeks the following interim reliefs:

I. Interim order staying the certificate marked X-1 issued by the 3rd respondent.
II. Interim order staying the notice marked P-19 issued by the 2nd respondent.
III. Interim order preventing one or more or all the respondents from taking any further action in respect of the certificate marked X-1 and/or notice marked P-19.

At the hearing, the learned President's Counsel for the petitioner and the learned State Counsel for the 1st to 3rd, and 6th respondents made oral submissions. Parties moved to file relevant judicial authorities in substantiating their arguments within one week but no party has filed the same.

The contention of the learned President's Counsel appearing for the petitioner was that the aforesaid certificate had been issued considering the fraudulent documents prepared by the 4th respondent. The learned President's Counsel contended further that a charge sheet containing 13 charges was served on the 4th respondent by the registered post but she refused to accept the charge sheet and failed to reply for the charges. In addition, the petitioner company has made a complaint against the 4th respondent to the Criminal Investigation Department for cheating, forgery, criminal breach of trust, and falsification of accounts. Therefore, the learned President's Counsel contended that the service of the 4th respondent has been terminated for reasons of fraud, misappropriation of funds of the employer and the 4th respondent's gratuity shall be liable to be forfeited to the extent of the damage or loss caused to the employer. The learned President's Counsel submitted that the 4th respondent had forged the signature of the director of the petitioner company, she has used the company seal without any acknowledgment from the petitioner company and submitted illegal documents to register for a new EPF number without the knowledge of the petitioner company. The learned President's Counsel pointed out that the Assistant Commissioner of Labour who held the inquiry disregarded the documents and facts submitted on behalf of the petitioner, and issued the said certificate relying on the fraudulent documents tendered by the 4th respondent. Accordingly, the contention of the learned President's Counsel was that the said certificate is *void ab initio* and in consequence, the proceedings of the Magistrate Court is also *void ab initio*.

The learned State Counsel appearing for the 1st to 3rd and 6th respondents contended that even though there is a matter to be looked into in relation to the certificate, no interim relief prayed for by the petitioner could be granted because the order of the learned Magistrate marked X-2 is a judicial pronouncement and, after the judicial pronouncement, the certificate upon which the decision of the learned Magistrate was based cannot be challenged. The learned State Counsel contended further that the writs of certiorari and prohibition prayed for by the petitioner could not be even considered because the petitioner is guilty of laches. The learned State Counsel pointed out that the impugned certificate was issued on 27th May 2020 and the petitioner filed this application on 02nd October 2023 about 3 years and 4 months later. She contended that because of this unexplainable long delay, this application should be dismissed without issuing notices to the respondents.

When the learned President's Counsel for the petitioner made his submissions, he drew the attention of the Court to the documents in which the 4th respondent admitted that her service was terminated by the petitioner. Hence, it appears that the way of obtaining a new EPF number is an issue to be considered. The petitioner company has complained to the CID regarding the 4th respondent's forgeries and misappropriation of funds. However, nowhere it was proved that the 4th respondent prepared forged documents and obtained a new EPF number. With regard to the misappropriation of funds, a charge sheet had been served on the 4th respondent, the 4th respondent has not responded, however, there was no disciplinary inquiry against her. In the circumstances, although the petitioner makes allegations of fraud, misappropriation, etc. against the 4th respondent, there is no finding with regard to a fraud, misappropriation of funds, or any other offence committed by the 4th respondent. When making an order to pay the amount mentioned in the said certificate, the

learned Magistrate has also considered the fact that there was no disciplinary inquiry against the 4th respondent and she has not been found guilty of an offence.

The 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.

According to Section 13 of the Act, on an occasion where the employee causes damage or loss to the employer as a result of fraud or misappropriation of funds of the employer, the gratuity is liable to be forfeited. In the case at hand, no such fraud or misappropriation of the 4th respondent is proved. In the absence of proof with regard to a fraud, misappropriation, or any other offence committed by the 4th respondent, there is no legal basis to forfeit the gratuity due to the 4th respondent. In the above circumstances, the argument that the certificate issued by the 3rd respondent is *void ab initio* cannot be accepted.

Be that as it may, the key issues to be determined are whether this application could be maintained to challenge the said certificate after the learned Magistrate made an order in the application based on that certificate and whether the Magistrate Court proceedings could be quashed by this writ application.

Now, the question arises, whether the certificate could be challenged without challenging the learned Magistrate's order with regard to the

application based on that certificate. The answer of the learned President's Counsel was that the order of the learned Magistrate could not be challenged in a revision application because the Magistrate's act in this matter is only a ministerial act. Therefore, the Learned President's Counsel submitted that the only remedy available was a writ application and that is why this writ application was filed to quash the said certificate and the entire proceedings of the Magistrate Court.

If the argument of the learned President's Counsel that the learned Magistrate performs only a ministerial act is accepted, this writ application cannot be maintained to quash the proceedings of the Magistrate Court bearing No. 39376/05/20 because in the cases of ***Gamini Atukorale v. Dayananda Dissanayake, Commissioner of Elections and Others*- (1998) 3 Sri LR 206** and ***Seenithamby Palkiararajah v. Dayananda Dissanayakc, Commissioner of Elections*** **- C.A. Application No. 674/2009** decided on 19.07.2018, it was clearly held that a ministerial function (performance of duty as prescribed by the law and not a discretionary function) is not amenable to the prerogative writ jurisdiction. In the case of ***Gamini Atukorale v. Dayananda Dissanayake, Commissioner of Elections and Others*** - (1998) 3 Sri LR 206, it was held that a ministerial act by its very nature does not attract the jurisdiction exercisable by way of a Writ of Certiorari.

In ***Seenithamby Palkiararajah v. Dayananda Dissanayakc, Commissioner of Elections***, it was held that "the thrust of the cases and the principle is that a ministerial function (performance of duty as prescribed by the law and not a discretionary function) is not amenable to the prerogative writ jurisdiction."

Therefore, it is apparent that if the argument of the learned President's Counsel that the learned Magistrate performs only a ministerial act is

accepted, this writ application cannot be maintained to quash the proceedings of the Magistrate Court.

However, it is necessary to consider the issues that in the recovery process of gratuity, whether the learned Magistrate performs only a ministerial act and whether the Order of the learned Magistrate cannot be canvassed in a revision application.

The question, what is a ministerial function has been discussed in the aforesaid judgment of ***Gamini Atukorale v. Dayananda Dissanayake, Commissioner of Elections and Others*** and the following portion of the judgment is important to the case at hand:

> "*Jain & Jain, Principles of Administrative Law, 4th Ed.*, states at page 325 that: functions dischargeable by the administration may either be ministerial or discretionary. A ministerial function is one where the relevant law prescribes the duty to be performed by the concerned authority in certain and specific terms leaving nothing to the discretion or judgment of the authority. It does not involve investigation into disputed facts or making of choices. The authority concerned acts in strict obedience to the law which imposes on it a simple and definite duty in respect of which it has no choice."

In a case of recovery of gratuity in the Magistrate Court, the learned Magistrate has the authority to look into the matter of whether the employer is liable to pay the amount of gratuity mentioned in the certificate. After hearing the employer, the learned Magistrate can make orders to pay the full amount mentioned in the certificate, to pay a part of the amount mentioned in the certificate or the learned Magistrate can make an order that the employer is not liable to pay the amount mentioned in the certificate. So, the learned Magistrate has the discretion to enforce

the certificate or not to enforce the certificate after considering the causes shown by the employer.

It is apparent that the Magistrate's function in recovering gratuity on a certificate filed is not just a ministerial function but it involves investigation into disputed facts although the matters that could be investigated are limited. The learned Magistrate has the discretion to recover either the full amount or only a part of the amount mentioned in the certificate. Not only that, the learned Magistrate has the discretion even not to recover any amount if the learned Magistrate is satisfied that the employer is not liable to pay the amount mentioned in the certificate. Therefore, the Magistrate's function in recovering gratuity does not fall into the aforesaid definition of "Ministerial Function" and I hold that it is a Judicial function.

X (Employer) V. Deputy Commissioner of Labour and Others reported in (1991) 1 Sri L.R. 222, is a case where two certificates had been filed by the Deputy Commissioner of Labour before the learned Magistrate in terms of section 8(1) of the Payment of Gratuity Act No. 12 of 1983 for the gratuity payable to two workmen. The order given by the learned Magistrate in this case was canvassed by way of a Revision Application. In the revision application, it was held in the Court of Appeal that "Showing cause against certificates issued under the Payment of Gratuity Act No, 12 of 1983, S.8(1) is not limited to showing that the petitioner was not the person named as defaulter in the certificate, that he has paid the amount specified in the certificate and that he is not resident within the jurisdiction of the Magistrate's Court but also extends to showing that the sums specified in the certificates are not due or that they have been incorrectly calculated because under S.8(2) of the Act, the Commissioner's certificate is only prima facie evidence". It was held further that "it is open to the petitioner

to displace the effect of the prima facie evidence by offering further evidence of an inconsistent or contradictory nature".

Therefore, it is evident firstly, that a revision application could be filed to challenge an order of the Magistrate in respect of an application of this nature. Secondly, the aforesaid Court of Appeal decision gives a clear answer to the issue of whether the process of recovering gratuity in the Magistrate Court is only a ministerial act or not.

In the aforesaid case, the Petitioner sought leave of the learned Magistrate to show cause that neither a part nor the whole of the sums referred to in the certificates were due from the Petitioner. The respondent objected on the ground that once a certificate is filed by the Commissioner after an inquiry in order to recover the sums specified in proceedings taken before the Magistrate, it was not open to the defaulter to show cause that the sums specified in the certificate are not due.

The learned Magistrate after consideration of the submissions made on behalf of the Petitioner and the Deputy Commissioner of Labour held that the only cause that the Petitioner could have shown was to establish:

(a) that the Petitioner was not the person named as the defaulter in the certificate,
(b) that he has paid the amount specified in the certificate,
(c) that the defaulter was not resident within the jurisdiction of the Magistrate's court.

In the appeal, the learned State Counsel appearing for the 1st and 3rd Respondents and the learned Counsel appearing for the 2nd Respondent (workmen concerned) contended that the use of the words "the Magistrate shall thereupon summon the defaulter before him to show cause why

further proceedings for the recovery of the sum due should not be taken" limits the scope of the cause that can be shown by the defaulter. They contended that the limits of the cause that could be shown as to why further proceedings should not be taken has been laid down by the Supreme Court in ***S.H.L Mohideen V. The Assistant Commissioner of Co-operative Development of Kalmunai*** - Argued on 4.4.1977 & decided on 13.3.1977 and in ***S.D. Danny V Commissioner of Labour*** - Argued on 1.9.88 and decided on 16.12.1988.

The decision of the aforesaid case of ***X (Employer) V. Deputy Commissioner of Labour and Others*** was as follows:

"With respect, whilst I agree with the decisions cited by learned counsel for the Respondents, the sections dealing with the recovery provision in the statutes that came up for consideration were different. The 1st of those cases were under the provisions of section 59(4) of the Co-operative Societies Law. Section 59(6) of that law stated that "Nothing in this section shall authorize or require a District Court or a Magistrate Court thereunder to consider, examine or decide the correctness of any statement in the certificate of the Registrar, and the latter case was one where recovery proceedings were taken under section 38(2) of the Employee's Provident Fund Act and section 38(3) of the said Act states "the correctness of any statement of the certificate issued by the Commissioner for the purpose of this section shall not be called in question or examined by the court in any proceedings 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 this Act from the defaulting employer has been duly calculated and that such amount is in default". A similar provision is also made in section 130(2) of the Inland Revenue Act and section 28(4) of the Employee's Trust Fund Act where finality and conclusiveness are given by the statute

to the particulars stated in the certificates for the recovery of sums due thereunder. In the instant case however, as stated above the particulars given in the certificate is only prima facie evidence of the matters stated therein and it is in my view open to the defaulter to controvert the position that the amount is due or that the amount has been incorrectly calculated by leading oral or documentary evidence."

I totally agree with the aforesaid decision of the Court of Appeal. Section 8(2) of the Payment of Gratuity Act has been correctly analyzed in the said judgment. According to the aforesaid provisions in the EPF Act, ETF Act and Inland Revenue Act, Commissioner's certificate cannot be questioned or examined by the court in any proceedings. But according to Section 8(2) of the Payment of Gratuity Act, the Commissioner's certificate is only prima facie evidence. That is why, it was held in the aforementioned decision that the jurisdiction of the Magistrate's Court, extends to allowing evidence to show that the sums specified in the certificate are not due or that they have been incorrectly calculated. Therefore, it is precisely clear that the function of the Magistrate is not merely a ministerial act and it is a judicial function. The order of the Magistrate is a judicial determination.

In the instant case, the position of the petitioner is that the sum specified in the certificate is not due from the petitioner company. That position could have been established in the Magistrate Court according to the aforesaid Court of Appeal judgment. If the said position was not accepted by the learned Magistrate, the petitioner could have filed a revision application against the order of the learned Magistrate. The petitioner failed to take both steps.

As explained above, it has been decided by this Court in aforementioned two cases as well as the Supreme Court in the case of *Gamini Atukorale v. Dayananda Dissanayake, Commissioner of Elections and Others* that a writ

application cannot be maintained to challenge a ministerial act. Now, this court has decided that the learned Magistrate's order was not a ministerial act but a judicial determination. Then, the question arises whether the learned Magistrate's order could be challenged in this writ application, as it is not a mere ministerial act but a judicial determination.

In the case of ***Wickremasinghage Francis Kulasooriya and another v. Officer-In-Charge, Police Station, Kirindiwela***- CA (Writ) Application No. 338/2011 decided on 22 October 2018, the issue of whether the Writ jurisdiction of this Court conferred under Article 140 of the Constitution would extend to review an order of the Magistrate's Court has been considered. It was held in this case that "If the Writ jurisdiction is invoked where an equally effective remedy is available, an explanation should be offered as to why that equally effective remedy has not been resorted to." This Court of Appeal decision was affirmed by the Supreme Court in SC Appeal 52/2021 decided on 14. 07.2023. In this Supreme Court judgment, the following portion from the judgment of ***Ishak V. Lakshman Perera Director of Customs and Others*** **– (2003) 3 Sri L.R 18** has been cited as follows:

> *This position was considered by Shirani Thilakawardena J in the case of Ishak V. Lakshman Perera Director of Customs and Others (2003) 3 Sri LR 18 as follows; "Where there is an alternative procedure which will provide the applicant with a satisfactory remedy the Courts will usually insist on an applicant exhausting that remedy before seeking judicial review. In doing so the Court is coming to a discretionary decision." Where there is a choice of another separate process outside the Courts, a true question for the exercise of discretion exists. For the Court to require the alternative procedure to be exhausted prior to resorting to judicial review is in accord with the* ***judicial review being properly regarded as being a remedy of***

last resort. *It is important that the process should not be clogged with unnecessary cases, which are perfectly capable of being dealt with in another tribunal. It can also be the situation that Parliament, by establishing an alternative procedure, indicated either expressly or by implication that it intends that procedure to be used, in exercising its discretion the Court will attach importance to the indication of Parliament intention."* (Emphasis added)

When the remedy of revision application was available to the petitioner, the petitioner company has not resorted to the said remedy and the only explanation was that the remedy of revision was not available to the petitioner. It has already been decided that the said explanation cannot be accepted. Hence, the petitioner has not given an acceptable reason for not resorting to the effective remedy of filing a revision application against the order of the learned Magistrate. In view of the above decision, the petitioner cannot invoke the discretionary remedy of writ jurisdiction of this court to quash the Magistrate Court order and its proceedings.

The most vital issue in this application is the delay. The learned State Counsel appearing for the 1st to 3rd and 6th respondents contended that the petitioner is guilty of laches for the unexplained delay. The learned State counsel pointed out that the impugned certificate was issued on 27.05.2020 and this application was filed on 2nd October 2023, after three years and four months. Therefore, she contended that this application should be dismissed for the reason of delay alone.

The learned President's Counsel appearing for the petitioner did not give any explanation for the delay. Even in the petition filed by the petitioner, no explanation for the delay is given. Citing the judgment of ***Biso Menika v. Cyril de Alwis and Others*** **- (1982) 1 Sri L.R. 368**, the learned President's Counsel urged to consider the merits of this application

disregarding the delay. In the aforesaid case of Biso Menika, the following observations have been made: “When the Court has examined the record and is satisfied the order complained of is manifestly erroneous or without jurisdiction, the Court would be loath to allow the mischief of the order to continue and reject the application simply on the ground of delay, unless there are very extraordinary reasons to justify such rejection. Where the authority concerned has been acting altogether without basic jurisdiction, the Court may grant relief in spite of the delay unless the conduct of the party shows that he has approbated the usurpation of jurisdiction. In any such event, the explanation of the delay should be considered sympathetically”.

Taking into consideration the aforementioned decision, now I proceed to consider whether the delay pertaining to this application could be disregarded. The delay affects this application in the following manner. Firstly, after issuing the certificate marked X in 2020.05.27, the petitioner had ample time to challenge the said certificate. The learned President’s Counsel for the petitioner contended that the certificate is *void ab initio*. If so, soon after the certificate was issued, the petitioner could have challenged the certificate in a proper forum without showing causes as to why the amount mentioned in the certificate should not be recovered because according to the petitioner, the certificate is invalid. However, the petitioner did not take any steps to challenge the certificate until the learned Magistrate made an order to pay the amount mentioned in the certificate. However, it has been decided previously in this judgment that the argument that the Commissioner’s certificate is void ab initio cannot be accepted. So, in the absence of any acceptable explanation regarding the delay of more than three years and four months the writ jurisdiction of this court cannot be exercised. Hence, this writ application must be dismissed on the ground of unexplained delay alone.

In this application, the main relief that the petitioner sought is to quash the certificate marked 'X' issued by the 3rd respondent. In addition, the petitioner sought to quash the notice issued by the 2nd respondent marked P-19 and to quash the entire proceedings of the Magistrate Court. Therefore, the second issue that arises as a result of the delay is whether the petitioner could ask to quash the certificate when the learned Magistrate has already made a determination on the said certificate.

After filing the certificate in the Magistrate Court on 27.05.2020, summons were issued to the petitioner company on 15.12.2022. In an application of this nature to recover the gratuity on a certificate filed, a petitioner who comes before the Magistrate Court on summons has two options. Either to challenge the certificate by way of writ application or to show cause before the Magistrate as to why the amount mentioned in the certificate should not be recovered. The petitioner appeared in the Magistrate Court chose the second option and moved for a date to show cause. By electing to show cause before the Magistrate as to why the sum mentioned in the certificate should not be recovered, the petitioner has waved off the right of challenging the certificate. After testing whether the second option would be successful, the petitioner cannot resort to the first option of challenging the certificate. If the certificate was void *ab initio* as the learned President's Counsel contended, the petitioner could have challenged the said certificate soon after it was submitted to the Magistrate Court.

Even after the 15th December 2022 before the order is pronounced on 31.08.2023, the petitioner has not taken any step to challenge the certificate. By making an application before the learned Magistrate to show cause on 15.12.2022, the petitioner opted not to challenge the certificate in a proper forum but to show cause before the Magistrate Court. Thereafter, when the learned Magistrate delivered the order directing the petitioner to pay the amount mentioned in the certificate, even the said

order was not challenged by exercising the available remedy of revision application. After three years and four months of issuing the certificate, the petitioner filed this writ application asking to quash both the certificate and the Magistrate Court proceedings. Hence, it is apparent that the time to challenge the certificate has passed. The learned Magistrate's order has not been challenged by way of a revision application. Now, what remains is only to implement the order of the learned Magistrate.

For the reasons stated above, I hold that this application cannot be maintained for the reliefs prayed for in the petition. Accordingly, I refuse to grant interim reliefs prayed for in the petition and refuse to issue notices to the respondents.

The writ application is dismissed without costs.

JUDGE OF THE COURT OF APPEAL

M. T. Mohammed Laffar, J
I agree.

JUDGE OF THE COURT OF APPEAL