

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

In the matter of an Application for orders in the nature of Writs of Certiorari and Mandamus under Article 140 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

CA (Writ) Application No: 47/2019

Hotels Colombo (1963) Limited,
(Grand Oriental Hotel),
No.2, York Street, Colombo 1.

PETITIONER

Vs.

1. R.P.A. Wimalaweera,
The Commissioner General of Labour.
2. Paviththra M. Warakagoda Gamage,
Assistant Commissioner of Labour.

1st and 2nd Respondents at
Labour Secretariat, Colombo 5.

3. Hon. Attorney General,
Attorney General's Department,
Colombo 12.

RESPONDENTS

Before: Arjuna Obeyesekere, J

Counsel: P.K.Prince Perera with Nadeeka Kularatne for the Petitioner

Sobhitha Rajakaruna, Senior Deputy Solicitor General with Ms.
Indumini Randeny, State Counsel for the Respondents

Supported on: 20th November 2019

Written Submissions: Tendered on behalf of the Petitioner on 2nd December 2019

Tendered on behalf of the Respondents on 18th December 2019

Decided on: 4th September 2020

Arjuna Obeyesekere, J

The Petitioner, who states that it is '*carrying out its business in the name of Grand Oriental Hotel*,'¹ is a limited liability Company duly incorporated under the Companies Act No. 7 of 2007.

In terms of Section 3(1) of the Budgetary Relief Allowance of Workers Act No. 4 of 2016 (the Act), '*with effect from May 1 2015, every employer in any **industry or service** shall, in respect of each month pay to every worker employed by him, a Budgetary Relief Allowance*' calculated at the rate specified in paragraphs (a) – (e) of that Section. Section 3(2) of the Act specifies the allowance that should be paid from 1st January 2016, onwards.

By a notice dated 19th July 2018 marked '**P2**', the 2nd Respondent Assistant Commissioner of Labour had directed the Petitioner to deposit a sum of Rs. 11,534,960 being the sum of money that the Petitioner should have paid by way of an allowance to its employees, as required by Section 3(1) and Section 3(2) of the Act, for the period set out therein.

Aggrieved by the said directive, the Petitioner had filed an appeal dated 31st August 2018 marked '**P3**' with the 2nd Respondent. The Petitioner admits that it was called for an inquiry before the 2nd Respondent, where it took up the position *inter alia* that the Petitioner is exempt from the payment of the said allowance to its employees.

Having afforded the Petitioner a hearing, the 2nd Respondent had issued an amended directive marked '**P4**' revising the sum mentioned in '**P2**' and directing the Petitioner to pay a sum of Rs. 10,416,709 before 22nd October 2018.

Aggrieved by '**P4**', the Petitioner invoked the jurisdiction of this Court, seeking *inter alia* a Writ of Certiorari to quash the said decision.

The learned Counsel for the Petitioner submitted that the major share holder of the Petitioner is the Bank of Ceylon, and that in view of the definition of 'Industry and Service' in Section 14 of the Act, the Petitioner is not liable for the payment of the

¹ Vide paragraph 1(a) of the petition.

said allowance. This was the only argument presented to this Court by the learned Counsel for the Petitioner.

The words, 'Industry and Service' have been defined as follows:

““industry or service” includes–

- (a) any trade, business, manufacture and agriculture, any undertaking or occupation by way of trade, business, manufacture or agriculture and any branch or section of trade, business, manufacture or agriculture;*
- (b) work or labour of any description whatsoever performed by persons in the employment of a local authority, or of a corporation established by or under any written law for carrying on an undertaking whether for purposes of trade or otherwise;*
- (c) every occupation, calling or service of workers, and*
- (d) every undertaking of employers,*

*but **does not include any industry, business or undertaking which is carried on by any corporation, board or other body** which was or is established by or under any written law where the Government holds a majority of the share capital with funds or capital wholly or partly provided by the Government by way of grant, loan or otherwise; or any registered society within the meaning of the Co-operative Societies Law, No. 5 of 1972;”*

The said definition in Sinhala reads as follows:

“කර්මාන්තය හෝ සේවාව” යන්නට

- (අ) යම් වෙළඳාමක් වෙළඳ ව්‍යාපාරයක්, නිෂ්පාදනය කිරීමක් සහ කෘෂිකර්මාන්තයක් ද, වෙළඳාමක්, වෙළඳ ව්‍යාපාරයක්, නිෂ්පාදනය කිරීමක් හෝ කෘෂිකර්මාන්තයක් වශයෙන් වන යම් ව්‍යවසායක් හෝ රක්ෂාවක් ද වෙළඳාමක, වෙළඳ ව්‍යාපාරයක, නිෂ්පාදනය කිරීමක හෝ කෘෂිකර්මාන්තයක යම් ශාඛාවක් හෝ කොටසක් ද;*
- (ආ) පළාත් පාලන ආයතනයක සේවයේ යෙදී සිටින හෝ වෙළඳාම පිණිස වූ හෝ වෙනත් ආකාරයක වූ ව්‍යවසායක් කර ගෙන යාම සඳහා යම් ලිඛිත නීතියක් මගින් හෝ ඒ යටතේ*

පිහිටුවනු ලැබූ යම් සංස්ථාවක සේවයේ යෙදී සිටින තැනැත්තන් විසින් ඉටු කරනු ලබන කවර හෝ ආකාරයක සේවයක්, වැඩක් හෝ ශ්‍රමය සැපයීමක් ද;

(ඇ) සේවකයන්ගේ සැම රක්ෂාවක්, පිටතෝපායක් හෝ සේවයක් ද; සහ

(ඈ) සේව්‍යෝජකයන්ගේ සැම ව්‍යවසායක් ද;

ඇතුළත් වන නමුත් ඊට යම් ලිඛිත නීතියක් මගින් හෝ ඒ යටතේ පිහිටුවා ඇත්තා වූ හෝ පිහිටුවනු ලබන්නා වූ ද, කොටස් ප්‍රාග්ධනයෙහි බහුතරය, රජය විසින් ප්‍රදානයක්, ණයක් හෝ අනන්‍යකාරයකින් සම්පූර්ණයෙන්ම හෝ කොටසක් ලෙස සපයනු ලබන අරමුදල්වලින් හෝ ප්‍රාග්ධනයෙන් සමන්විත වන්නා වූ ද යම් සංස්ථාවක්, මණ්ඩලයක් හෝ වෙනත් ආයතනයක් විසින් පවත්වාගෙන යනු ලබන යම් කර්මාන්තයක්, වෙළඳ ව්‍යාපාරයක් හෝ ව්‍යවසායක් හෝ පාලිත රාජ්‍ය සභාවේ 1972 අංක 5 දරන සමුපකාර සම්භි පනතේ අර්ථනුකූලව යම් ලියාපදිංචි කළ සමිතියක් ඇතුළත් නොවේ;”

This Court, having carefully considered the above definition, is of the view that the following requirements must be satisfied by the Petitioner if it is to be excluded from the definition of ‘industry or service’, and thereby not be liable for the payment of the said allowance:

- a) The industry, business or undertaking must be carried out by any corporation, board or other body which was or is established by or under any written law;
- b) The Government must hold a majority of the share capital in the said industry, business or undertaking with funds or capital wholly or partly provided by the Government by way of grant, loan or otherwise

As noted at the outset, the Petitioner has admitted that the Petitioner is **carrying out its business in the name of Grand Oriental Hotel**. Thus, on its own admission, the business to which the Act has been applied, and to which ‘**P2**’ and ‘**P4**’ relates to, is being carried out by the Petitioner, and not by the Bank of Ceylon. For the exclusion to apply, the requirement of the Act is that the business must be carried out by the entity in which the Government holds the majority of the shares. This Court is of the view that the exclusion cannot be extended to entities where shares are not held by the Government, but by entities in which the Government holds the majority of the shares. Thus, this Court is of the view that the above exclusion does not apply to the Petitioner, as the Petitioner has failed to meet the first requirement.

Furthermore, the requirement is that the majority of the shares must be held by the Government in the entity that is engaged in the industry, business or undertaking. While the Government holds the majority shares in the Bank of Ceylon, it is admitted that it is not the Government, but the Bank of Ceylon that holds the majority shares in the Petitioner. In the light of the above conclusion of this Court that the business of the Grand Oriental Hotel is being carried out by the Petitioner, and not by the Bank of Ceylon, it is the view of this Court that the Petitioner has failed to meet the second requirement that must be satisfied in order to qualify for the exclusion.

This Court must also note that 'P2' and 'P4' refer to the Petitioner, and not the Bank of Ceylon, as the employer. Furthermore, representations in 'P3' were made on behalf of the Petitioner, and not the Bank of Ceylon, which confirms that it is the Petitioner who is the employer. This too demonstrates that the provisions of the Act have been made applicable to employees of the Petitioner, and not the Bank of Ceylon.

The learned Senior Deputy Solicitor General submitted that an employer can claim the benefit of the above exclusion only if it is a corporation, board or body which is established by or under any written law. He submitted that the Petitioner has been incorporated in terms of the Companies Act and therefore does not satisfy the requirement that it must be a body which is established by or under any written law. However, the necessity for this Court to consider the said submission does not arise in view of the above conclusion of this Court.

In the above circumstances, this Court does not see any legal basis to issue notice of this application on the Respondents. This application is accordingly dismissed, without costs.

Judge of the Court of Appeal