

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 and in terms of Article 140 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

Lanka Electricity Company (Private) Limited (LECO),
No. 411, E.H. Cooray Building, Galle Road,
Colombo 03.

PETITIONER

Vs.

**Court of Appeal Case No:
CA/WRIT/120/2024**

1. B.K. Prabhath Chandrakeerthi,
Commissioner General of Labour.
Mehewara Piyasa, Labour Secretariate,
Narahenpita, Colombo 05.
2. Siri Sinhapulli,
No. 117, Sinhapura Road, Pelawatta,
Battaramulla.
3. Hon. Minister Manusha Nanayakkara,
Minister of Labour and Foreign
Employment,
Mehewara Piyasa, Labour Secretariate,
Narahenpita, Colombo 05.
4. M.G.D.U.K. Mapa Pathirana,
The Secretary, Ministry of Labour,
Mehewara Piyasa, Labour Secretariate,

Narahenpita, Colombo 05.

5. K.K.W.R. Kariyawasam,
Lihiniyawa, Maha Kalupahana,
Matugama.

RESPONDENTS

Before: S.U.B. Karalliyadde, J
Mayadunne Corea, J

Counsel: Saman Galappathi for the Petitioner.
Pubudu De Silva instructed by Kalana S. Dinayadura for the 6th
Respondent.
Pulina Jayasuriya S.C. for the 1st, 3rd, 4th and 5th Respondents.

Supported on: 26.11.2024

Decided on: 20.12.2024

Mayadunne Corea J

The Petitioner among other reliefs seek,

“(b)... an order to issue a mandate in the nature of a Writ of Certiorari quashing the decision contained/reflected in the Gazette notification marked “P-35”, ”

The facts of the Petitioner’s Application are briefly as follows. The 6th Respondent was employed by the Petitioner company with effect from 01.06.1989 as a “Billing Trainee”. The Petitioner states that the Billing Trainees are recruited on a contract basis, and after

the completion of the 2 years and 6 months training period, they are absorbed into the permanent carder as “Revenue Officers”.

The Petitioner further submitted that if the work was not up to standard during their initial probationary period, the Trainee Billing Officer’s probationary period is extended for a further 6 months or their services are terminated. The Petitioner further alleges that as the 6th Respondent was employed on a contract basis and his work was not satisfactory during the training period, he was not confirmed and his probationary period was extended to cover the entire period of 2 years. It is alleged that with effect from 01.01.2001, the 6th Respondent was given the post of Revenue Officer but due to his unsatisfactory work, he was placed on a salary scale of A3. However, as submitted, subsequently he had been placed on a salary scale of A5 with effect from 01.01.2019. The 6th Respondent being aggrieved by the decision to place him on an A3 salary scale at the time of appointment as a Revenue Officer complained of an industrial dispute. Upon forming an opinion that there was an industrial dispute, the 3rd Respondent referred the matter to arbitration under Section 4(1) of the Industrial Disputes Act as amended by the Industrial Disputes (Special Provisions) Act, No. 37 of 1968, (referred to as “IDA” herein after).

The Arbitrator after inquiry ordered the 6th Respondent to be placed on A5 scale from 01.01.2001 and further ordered the employer to pay his salary difference in arrears. Being dissatisfied with the said award, the Petitioner, the employer tendered a notice of repudiation, and filed this Writ Application.

The learned State Counsel appearing for the 1st, 3rd, 4th and 5th Respondents submitted that they were not forcefully contesting the award. However, the learned Counsel appearing for the 6th Respondent vehemently objected to the issuance of notice.

The 6th Respondent’s Objections

The 6th Respondent objecting to the issuance of notice took several preliminary objections. It was contended among other things, that the Petition had been filed with undue delay and also that the Petition has to be dismissed in *limine* for non-compliance with the mandatory provisions of the IDA namely, Section 31DDDDD. They also took up an objection stating that the Petitioner has failed to challenge the arbitrator’s award on any grounds amenable

to be quashed in a Writ Application. It was also argued that the Petitioner has failed to demonstrate that the award is *ultra vires*.

This Court will now consider the Petitioner's submissions with the objections raised by the 6th Respondent.

The Petitioner contends that the 6th Respondent's work was not satisfactory during the period he was a trainee. In the light of this submission this Court observes that as per the submissions of the learned Counsel for the Petitioner, the Petitioner had the right to either extend the probation period for a further 6 months or to terminate his services at the end of the contract period for unsatisfactory work. The contract of the 6th Respondent is marked as P1. Yet, in 1994 by the document marked as P5, the Petitioner went a step further and appointed the 6th Respondent to a permanent post as a "Billing Trainee". Subsequently, by a letter dated 11.07.2002, he had been promoted to a Grade III Revenue Officer with effect from 01.01.2001 and posted on the salary scales of A3. The Petitioner contended that thereafter he was subsequently promoted (P15).

This Court observes that the learned Counsel for the Petitioner took great pain to impress upon Court that the 6th Respondent's work was unsatisfactory and he could not have been placed on the salary scale of A5 but the Petitioner failed to explain the reason as to why the 6th Respondent was promoted if his work was so unsatisfactory when the option to terminate the service was available.

Dispute before the Arbitrator

As shown in the document marked as P16, an arbitrator had been appointed and the said dispute was referred for arbitration under the IDA. The said referral is marked as P17. The dispute referred to states as follows;

"Whether Mr. K.K.W.R. Kariyawasam is entitled for the post of Revenue Officer and if so, to what relief from which period and whether he has been caused injustice by being appointed to the post of Revenue Officer- Grade III from 01.01.2001 and being appointed grade wise and if so, to what relief is he entitled."

After a lengthy inquiry, the arbitrator gave the award. The said award is published in the Gazette No. 2344/13 dated 07.08.2023 which is marked as P4. The arbitrator's award states as follows;

“එහෙයින් කම්කරු කොමසාරිස් ජනරාල්වරයා විමසා සිටින පරිදි

- කේ.කේ.ඩබ්.ආර්. කාරියවසම් නමැති අය 2001.01.01 දින සිට III වන ශ්‍රේණියේ ආදායම් නිලධාරී තනතුරට පත් කිරීමෙන් (එම පත්වීම ශ්‍රේණිගතව ලබා දීමෙන්) එම සේවකයාට අසාධාරණයක් සිදුව ඇති බවද
- පළමු පාර්ශ්වය වන ඉල්ලුම්කාර කේ. කේ. ඩබ්ලිව්. ආර්. කාරියවසම් නමැති අයට 2001.01.01 දින සිට ලංකා ඉලෙක්ට්‍රිසිටි කම්පැණි (ප්‍රයිවට්) ලිමිටඩ් සමාගමේ 5 වන ශ්‍රේණියේ ආදායම් නිලධාරී තනතුරට පත්වීමට හිමිකම් පවතින බව ද දක්වමි.
- කේ. කේ. ඩබ්ලිව්. ආර්. කාරියවසම් නමැති අය 2001.01.01 දින සිට සත්‍ය වශයෙන්ම ඔහුට හිමි 5 වන ශ්‍රේණියේ ආදායම් නිලධාරී තනතුරට අයත් 7055 - 110 × 10 - 8155 වැටුප් ක්‍රමයේ ආරම්භක වැටුපේ පිහිටුවා මෙම ප්‍රදාන පත්‍රය ගැසට් ගත කොට මාස තුනක් ඉක්ම වන්නට ප්‍රථම හිඟ වේතන ගෙවන ලෙස ලංකා ඉලෙක්ට්‍රි සිටි කම්පැණි (ප්‍රයිවට්) ලිමිටඩ් සමාගම වෙත නියෝග කරන අතර කේ. කේ. ඩබ්ලිව්. ආර්. කාරියවසම් නමැති අය විසින් එම ගෙවීම් ලබාගත් බවට---

The Petitioner's main contention before this Court is that the award is *ultra vires* the referral. However, the learned Counsel for the Petitioner failed to establish on what basis the arbitrator's award is *ultra vires*. At this stage, it is pertinent to note that this is a Writ Application and not an appeal. The consideration of a Court in a Writ Application is different to that of an appeal. The Petitioner in a Writ Application seeking a Writ of *Certiorari* has to demonstrate that there is a procedural defect in the arbitral proceedings followed by the arbitrator's award. The Petitioner has failed to impugn the award or the proceedings on the basis of *ultra vires*, illegality, or any of the grounds that he is entitled to invoke the Writ jurisdiction of this Court. The Petitioner has failed to demonstrate to this Court with evidence any of the grounds that warrant the intervention of this Court.

Now this Court will consider the next objection, Namely, Petitioner's failure to comply with the provisions of the IDA.

Non-compliance with the Provisions of the Industrial Disputes Act

The 6th Respondent, contends that Petitioner has failed to comply with Section 31DDDDDD of the IDA. The said Section states as follows.

“31DDDDDD - Employer to furnish a security in respect of an Application to the Court of Appeal.

- (1) Where an Application is preferred by an employer to the Court of Appeal, for the issue of an Order in the nature of a writ, against an award made by an arbitrator under Section 17(1) or by an industrial court under Section 24, the Court of Appeal shall entertain such Application upon furnishing a security by such employer, in cash to the Commissioner-General, where such award which is subject to such Application directs the payment of a sum of money to the worker, of an amount equal to such sum.***
- (2) The Commissioner-General shall cause to be deposited the sum as specified in subsection (1) in an account bearing interests, maintained by the Commissioner-General, in any approved bank in Sri Lanka.***
- (3) Every Application preferred under this subsection, shall be supported by a certificate under the hand of the Commissioner-General to the effect that the security as specified in subsection (1) has been duly furnished by such employer.”***

As per the above-mentioned Section for the Court of Appeal to entertain the Application of the employer, the Petitioner has to furnish security to the Commissioner General. Further, every application preferred should be supported by a certificate under the hand of the Commissioner General to establish that security under subsection (1) has been furnished.

Section 31DDDDDD (1) states that there should be an award which is subjected to the application which directs the payment of money to the worker. A deposit should be of an amount equal to the said sum. In this instance, the Court finds that the Petitioner has not pleaded his compliance under Section 31DDDDDD nor has he pleaded the certificate issued by the Commissioner General in compliance with Section 31DDDDDD.

However, the learned Counsel for the Petitioner in reply submitted that there is no such award for them to comply with. In view of this submission, this Court has considered the relevant order which is marked as P34, and we find that the 3rd bullet point in the said award, the arbitrator has ordered the 6th Respondent to be placed on Grade 5 Revenue Officer's post and to place him on the 1st salary step. The award clearly states that within 3 months of the publication of the award, the salary in arrears which the 6th Respondent is entitled to, should be paid. Hence, the said sum should have been deposited as security and the Commissioner General's certificate should have been pleaded to support this Application.

There is no dispute between the parties that the 6th Respondent has not been placed on the said salary scale from 01.01.2001. Hence, in our view, this order contains a monetary award whereby the Petitioner is directed to make a payment of a sum of money to the worker. Thereby, Section 31DDDDD (1) applies to this Application. In view of the 3rd bullet point of the award above, this Court is not inclined to accept the Petitioner's contention that there was no specific monetary award made to pay, for the Petitioner to comply under subsection (1) of Section 31DDDDD. We are not inclined to accept the contention that the Petitioner company was not given a clear instruction to pay the money. In our view, the Petitioner should have complied with Section 31DDDDD.

At this stage, this Court will briefly examine the advent of the amending Section that imposed the condition to deposit the money awarded as a security.

The requirement to make a security deposit was not available in the original Act, No. 43 of 1950. This requirement was first introduced by the Amendment Act, No. 32 of 1990. The said Section then states,

"Sections 31D

(4) Every employer who-

(a) ...

(b) makes an application for issue an order in the nature of a writ of certiorari, prohibition, Procedendo or mandamus against the President of the Labour a labour tribunal, in respect of an order made by such President,

Shall furnish to such labour tribunal security in cash-

(i)...

(ii)...

(iii)...

....

(8) Every application referred to in paragraph (b) of subsection (4) shall be accompanied by a certificate issued under the hand of the President of the labour tribunal to the effect that the applicant, has furnished the security he is required to furnish under that subsection.”

Thereafter the Act was further amended by Amendment Act, No. 22 of 2022. The said amendment brought in Section 31DDDDD. It is also pertinent to note that though Section 31DDDDD enables an employer aggrieved by an order of an arbitrator or an industrial court to invoke the Writ jurisdiction against such order. The said Section also imposed certain conditions on a Petitioner in invoking the said Writ jurisdiction of the Court of Appeal pursuant to Section 31DDDDD. After a careful consideration of the two amendments, this Court observes that the said conditions available in Amendment Act, No. 22 of 2022 are not visible in the Amendment Act, No. 32 of 1990.

By the new amendment the Legislature has created pre-conditions the Petitioner has to comply with. The wording in the said pre-condition reads as “*the Court of Appeal shall entertain*”. Hence, as per the new amendment, for the Court of Appeal to entertain an Application, the Petitioner has to follow the said conditions stipulated in the Amendment Act, No. 22 of 2022.

In summary, by the new Amendment, the Legislature has imposed the conditions to deposit the security and for the Petition to accompany the certificate under the hand of the Labour Commissioner to enable his Application to be entertained by the Court of Appeal pursuant to the Section. It is the view of this Court that the Petitioner has to make the deposit of security before he files the Writ Application.

The award in this case has been published in the extra ordinary Gazette notification No. 2344/13 dated 07.08.2023. The Petitioner has filed the Petition on 19.02.2024 which is nearly six months after the award published.

However, it is not in dispute that the Petitioner had not deposited the security at the time of filing the Petition. Therefore, the Petitioner has not pleaded in the Petition that the security has been deposited nor has the certificate under the hand of the Labour Commissioner been pleaded in the Petition. On a perusal of the Docket this Court finds that up to the date of support of this Application, there is no evidence of the deposit being made or the certificate of the Commissioner General attached to the Petition. In short, the Petitioner has failed to comply with the pre-conditions set out in the Amendment Act, No. 22 of 2022.

This Court on several occasions has held that non-compliance with Section 31DDDDDD is fatal to a Writ Application. Considering the judgements of *Wimalasiri Perera and others v. Lakmali Enterprises Diesel and Petrol Motor Engineers and others* [2003] 1 SLR 62 and *Linea Aqua (Pvt) Ltd v. P. Chinthaka Lakdewa De Silva* SC Appeal No. 178/2018 decided on 13.11.2019 this Court has come to the said conclusion, in *Lanka Electricity Company (Pvt) Limited v. The Commissioner of Labour and others* CA Writ 753/23 decided on 30.09.2024 and in *The National Institute of Business Management v. Commissioner General of Labour and others* CA writ 74/2024 decided on 29.11.2024.

Hence, in this case too following the above decisions and for the reasons stated above we conclude that non-compliance with Section 31 DDDDD is fatal to a Writ Application.

Furthermore, Samayawardhena J. in the recent case of *Duro Pipe Industrial (Pvt) Ltd v. Hettige Pradeep Silva* SC/APPEAL/111/2022 decided on 02.12.2024 held that,

“If the appeal, application for revision or writ is not accompanied by a certificate issued under the hand of the President of the Labour Tribunal confirming that the appellant or applicant, as the case may be, has furnished the required security as stated in section 31D(8), the High Court shall reject the appeal or application.

By virtue of sections 1A and 1B of section 31DD, and section 31DDDDDD of the Industrial Disputes Act, introduced by Act No. 22 of 2022, the attachment of such a certificate obtained from the Labour Tribunal is mandatory when the employer invokes the jurisdiction of the Supreme Court and the Court of Appeal as well.”

Hence in my view, the 6th Respondent’s objection has to succeed.

Suppression of material facts and misrepresentation

This Court also observes the Petitioner failed to explain the non-compliance with the provisions of the Act. In addition to the non-compliance by his conduct, by virtue of not disclosing the fact that the Petitioner company has failed to deposit the security as contemplated by the Statute the Petitioner becomes guilty of suppressing material facts and of misrepresentation. By the said non-disclosure on the failure to deposit the security the Petitioner has not come to Court with clean hands.

Janak De Silva J in *Adam Bawa Assia Umma and others v. Divisional Secretary and others CA (Writ) 224/2012 decided on 26.05.2020* held that “in *Fonseka v. Lt. General Jagath Jayasuriya and Five Others* [(2011) 2 Sri.L.R. 372] a divisional bench of this Court held:

‘(1) A petitioner who seeks relief by writ which is an extra-ordinary remedy must in fairness to Court, bare every material fact so that the discretion of Court is not wrongly invoked or exercised.

(2) It is perfectly settled that a person who makes an ex parte application to Court is under an obligation to make that fullest possible disclosure of all material facts within his knowledge.

(3) If there is anything like deception the Court ought not to go in to the merits, but simply say " we will not listen to your application because of what you have done. ”

It is observed that in the limited objections filed by the 6th Respondent in paragraph 2 of the said objection, the 6th Respondent has specifically raised a preliminary objection stating that the Petitioner has failed to comply with Section 31 DDDDD and has failed to deposit the security.

Delay

The 6th Respondent has also taken up the objection of undue delay. It is contended that the award was published on 07.08.2023. The Petitioner has filed this Application only on 19.02.2024 and it is contended that there is a delay of nearly 6 months in filing this Application.

The Petitioner stated that the Petitioner company initially sought the assistance of the Hon. Attorney General to represent them in this Writ Application. However, the Hon. Attorney General declined to appear stating that the State is appearing on behalf of the Labour Commission. Thus, there was a delay in filling this Application.

However, it must be noted that the Petitioner has failed to establish this fact with any material pleaded with the Petition. The Petitioner has failed to plead any of the correspondence to establish the above mentioned submission. In a Writ Application the burden is on the party seeking relief. Therefore, the Petitioner has failed to substantiate his explanation or justify the delay.

In the case of *Saranguhewage Garvin De Silva v. Lankapura Pradeshiya Sabha and others* SC Appeal 10/2009 decided on 15.12.2014, at page 5, it was provided that,

“The burden of proof in any application for prerogative writ including mandamus is on the person who seeks such relief, to prove the facts on which he relies”

Accordingly, this Court is inclined to uphold the objections of the Respondents and for the aforesaid reasons this Court refuses to issue formal notices on the Respondents as pleaded by the Petitioner. Hence, we proceed to dismiss this Application.

Judge of the Court of Appeal

S.U.B. Karalliyadde, J

I agree

Judge of the Court of Appeal

