

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

*In the matter of an application in terms of
Article 140 of the Constitution of Sri Lanka for
a mandate in the nature of writ of Certiorari.*

CA/WRIT/256/2021

People's Bank
75, Sri Chittampalam A. Gardiner
Mawatha,
Colombo 02.

PETITIONER

Vs.

1. Hon. Minister of Labour
Foreign Employment and Petroleum
Resources Development,
2nd Floor,
Labour Secretariat,
Colombo 05.
2. Commissioner General of Labour
Labour Secretariat,
Narahenpita,
Colombo 05.
3. S.M.S. Jayawardena
Arbitrator,
No.213, 1st Lane Egodawatte,
Boralesgamuwa.
4. H.M.Chandrapala
No.37/4,
Ulpathakumbura,
Ampitiya.

RESPONDENTS

Before: Sobhitha Rajakaruna J.

Dhammika Ganepola J.

Counsel: Manoli Jinadasa with Amanda Wijesinghe for the Petitioner

Amasara Gajadeera S.C. for the 1st and 2nd Respondents

Geoffrey Alagaratnam P.C. with Andrew Keshan for the 4th Respondent

Argued on: 06.06.2023, 27.09.2023

Written submissions: Petitioners - 31.08.2023

4th Respondent - 31.08.2023

Decided on: 15.12.2023

Sobhitha Rajakaruna J.

The primary relief sought by the Petitioner in the instant Application is for an order in the nature of a Writ of Certiorari quashing the Arbitral Award dated 24.12.2020 marked 'X10' ('Award') and the Gazette Extraordinary No.2217/12 published on 02.03.2021 marked 'X10b'.

Based on an internal audit report a preliminary investigation has been conducted against the 4th Respondent who was serving as the Manager of the Wattegama Branch of the Petitioner Bank ('Bank'). As per the Petitioner, the report of the said internal audit has revealed the following misconduct:

- a. "Between the period 01.01.2007 to 31.07.2007 (period of 7 months) the owner (Mr.T.M.Veemaraj) and two employees (P.Rajendra, and N.M.D.P.T.Jayarathna) of a partnership named Chitra Jewellers had pawned 94 items for an advance of Rs. 10, 202,100/-;
- b. The items included 329 ornate bangles;
- c. Out of these items 28 items were identified as low in value and a sample checked with decimeter revealed items less than 5 Karat were among them;
- d. It was revealed that 30 ornate items were valued at 24 Karat violating instructions provided in circulars;
- e. Officer at the pawning center had obtained the approval from the 4th Respondent (Managing Branch) for advances beyond authorized limit of the officers;

- f. There had been no record of the 4th Respondent obtaining approval from Regional Assistant Managing Director for pawn advances provided for the three individuals exceeding his authorization limit;
- g. Though the Wattagama Branch Manager had conducted bi-annual checks on the pawned items, he had not disclosed any information about this jewelry in his reports" (Vide- X8-R5-Page 852 to 855 of the Brief)

Consequent to the investigation, the Bank has imposed the following punishments against the 4th Respondent:

- a. Sever warning with effect from 03.03.2009
- b. If the Bank incurs any loss due to non-recovery of the relevant loan, to charge a sum of Rs. 250,000 in monthly installments of Rs.7500 and to deduct Rs.25,000 from the year-end gratuity and further if any balance remains, that is to be charged from the retirement gratuity.
- c. However, in the event the loan is recovered, the 4th Respondent will be refunded the amount recovered as above.

In the meantime, the 4th Respondent on 31.03.2010 retired from his services at the Bank. Almost after five years from the date of imposing the above punishments, the 4th Respondent has made a complaint to the 2nd Respondent - Commissioner General of Labour ('Commissioner'). As a result, the 1st Respondent - Minister of Labour, has referred the matter for arbitration under section 4(1) of the Industrial Disputes Act No. 43 of 1950. The order referring the matter to arbitration and the statement disclosing the dispute are marked as 'X2' & 'X2b' respectively. Accordingly, the following dispute has been referred to the 3rd Respondent - Arbitrator ('Arbitrator'):

"Whether Mr.H.M. Chandrapala who had worked as a Branch Manager of the People's Bank had been caused injustice by the punishment given by the disciplinary decision stated in the internal letter dated 24.07.2009, issued by Chief Manager (Human Resources) of the People's Bank and if so, to what reliefs he is entitled?"

After an inquiry, the Arbitrator decided that imposing punishments against the 4th Respondent was not justifiable and accordingly he issued his Award marked 'X10' granting the following reliefs in favor of the 4th Respondent.

01. The Bank is to return to the 4th Respondent, the sum of Rs. 250,000 which had been retained by the Bank.
02. The 4th Respondent is to be given the interest rate paid by the Bank from the date the above sum of money was retained.
03. The Bank is to pay compensation in place of the privileges assigned to the 4th Respondent's Grade II promotion, from the date on which such purported promotion was due.
04. The Bank is to pay the 4th Respondent the cost of litigation.

I am aware that in view of the judgment in *Kalamazoo Industries Ltd. and others v. Minister of Labour and Vocational Training and Others [1998] 1 Sri.L.R. 235 at p. 249*, "the relief by way of certiorari concerning an Award made by an arbitrator will be forthcoming to quash such an Award only if the arbitrator wholly or in part assumes a jurisdiction which he does not have or exceeds that which he has or acts contrary to principles of natural justice or pronounces an Award which is eminently irrational or unreasonable or is guilty of an illegality."

The key argument of the Petitioner is that the Arbitrator has reached an irrational conclusion in his Award as he has granted relief in favor of the 4th Respondent upon matters completely outside the 'reference to arbitration'. The Petitioner contends that the Arbitrator has taken into consideration the non-granting of a promotion to the 4th Respondent which is never emanated from the above punishments imposed against the 4th Respondent. The Petitioner stresses that the mandate given to the Arbitrator by 'X2' & 'X2b' is to evaluate whether any injustice has been caused to the 4th Respondent by the punishments imposed as a result of the disciplinary order reflected in the internal letter dated 24.07.2009 (the said letter is at page 16 of the Brief).

In contrast, the 4th Respondent argues that in terms of section 16 of the said Industrial Disputes Act, the Arbitrator is empowered to consider and decide any other matter which is shown to his satisfaction to have been a matter in dispute between parties.

Section 16 reads:

“Every order under section 3(1)(d) referring an industrial dispute for settlement by arbitration to an arbitrator or a body of arbitrators (and accordingly the expression “arbitrator” shall hereafter in this Act be construed, where an industrial dispute has been referred to an arbitrator, as a reference to that arbitrator, or, where such dispute has been referred to a body of arbitrators, as a reference to that body of arbitrators), or every order under section 4(1) referring such dispute to an arbitrator for settlement by arbitration shall be accompanied by a statement prepared by the Commissioner setting out each of the matters which to his knowledge is in dispute between the parties.

Nothing in the preceding provisions of this section shall be deemed to be in derogation of the power of the arbitrator to whom the dispute is referred to admit, consider and decide any other matter which is shown to his satisfaction to have been a matter in dispute between the parties prior to the date of the aforesaid order, provided such matter arises out of or is connected with a matter specified in the statement prepared by the Commissioner.”

Although the said section 16 declares that the Arbitrator has the power to consider and decide any matter as mentioned therein, such discretion must be exercised subject to the proviso spelled out in the same section. Accordingly, an Arbitrator may consider any other issue based on his satisfaction, but he can do so only on a matter arising out of or is connected with a matter specified in the statement prepared by the Commissioner. As per the main portion of the said section, every order under section 4(1) of the Industrial Disputes Act, referring a dispute to an arbitrator, for settlement by arbitration, should be accompanied by a statement prepared by the Commissioner setting out each of the matters which to his knowledge is in dispute between the parties. Hence, it is not lawful for the Arbitrator to exceed his jurisdiction beyond the mandate granted to him through the reference to arbitration and in addition to that, the Arbitrator may only consider issues arising out of the matters mentioned in such a statement prepared by the Commissioner.

There is no material before this Court to ascertain whether the Arbitrator has drawn his attention to such a statement other than the 'reference to arbitration' prior to the commencement of the proceedings before him. The Commissioner in 'X2b' elucidates the nature of the dispute between the parties and accordingly what is required from the Arbitrator is to evaluate whether any injustice has been caused to the 4th Respondent by the punishments imposed as mentioned above. Apparently, the Arbitrator when granting reliefs to the 4th Respondent has considered a purported promotion that was not granted to the 4th Respondent and has directed the Bank to pay compensation in place of the privileges assigned to the 4th Respondent's such promotion. Now, a question arises as to how the Arbitrator related the issue of promotion with the punishments imposed against the 4th Respondent. Similarly, it is a question whether the Arbitrator has arrived at an independent conclusion that the issue on promotion is a matter arising out of the dispute which was referred to him by 'X2b'.

On a careful perusal of the Arbitrators Award at 'X10b', it is observed that he has correctly identified the dispute referred to him in his Award in the paragraph under the subheading "*Reasons for the Dispute*" ('ආරවුලට තුඩු දුන් කාරණය'). The contents under that subheading have no contradiction to the aforesaid reference to arbitration. However, the Arbitrator, in his Award, particularly at the commencement of the paragraph under the subheading "*Background*" ('පසුබිම') has deviated from the question referred to him and has assumed that the 4th Respondent had requested an arbitration in order to claim for compensation in lieu of the damages caused to the good repute of the 4th Respondent and his family. The Arbitrator has further assumed that the 4th Respondent has made such a claim as a result of losing his promotion on the pretext of the disciplinary inquiry held against him.

The Bank under the People's Bank Act No.29 of 1961 has the power to make rules in respect of the conditions of service and disciplinary control of the officers and servants of the Bank. Every promotion needs to be made only following a scheme of recruitment or any such procedure. The Disciplinary Code of the People's Bank ('X8-R6') recognizes the deferment of a promotion to a higher Post/ higher Grade or reduction in Grade/Rank as punishment after disciplinary proceedings. It is paramount that the officer concerned is required to fulfill in advance all necessary criteria to be eligible for a promotion before raising any claim for such promotion. Hence, even if the relevant officer wishes to challenge a disciplinary

authority's decision to defer a promotion or reduce in Grade, such an officer should first establish his entitlement for the respective promotion.

In light of the above, I am not convinced that the Arbitrator has given due consideration to the above aspects relating to the purported promotion before he granted reliefs in his Award. It is important to note, that the deferment of a promotion or the reduction in Grade is not reflected in the particular punishments imposed against the 4th Respondent. Further, the reference to arbitration specifically requires the Arbitrator to deal only with the punishment imposed against the 4th Respondent. The 'X2b' which was issued under the hand of the Commissioner, does not refer to any alleged damages caused to the good repute of the 4th Respondent and his family members. Not only such matters relating to the good repute of the 4th Respondent but also the expenses incurred by him when attending the proceedings before the Industrial Court cannot be considered as matters referred to the Arbitrator. In the circumstances, I hold that the reliefs No. 3 and 4 in the impugned Award have been granted exceeding the mandate given to the Arbitrator by the relevant Minister.

Now I must advert to the other two reliefs granted by the Arbitrator in the said Award 'X10'. The 4th Respondent asserts that the sum of Rs.250,000 was taken by the Bank from the pension of the 4th Respondent and not from his gratuity and as such the Payment of Gratuity Act No. 12 of 1983 has no bearing on the punishments imposed against the 4th Respondent. It was further argued on behalf of the 4th Respondent that a fine of a sum of Rs.250,000 has been imposed without conducting a formal disciplinary inquiry, upon a charge sheet, against the 4th Respondent. The Petitioner argues that the question whether the said sum of Rs.250,000 would be deducted from the 4th Respondent's retiring gratuity wasn't an issue before the Arbitrator and the Bank did not have the opportunity to present any evidence or examine witnesses in regard to such issue as it was not raised by the 4th Respondent during the proceedings before the Arbitrator. However, the fact that remains to be seen is that a sum of Rs. 250,000 has been retained by the Bank as a part of the punishment imposed by them against the 4th Respondent.

The Petitioner contends that this is a situation where there are two employees, including the 4th Respondent, that have caused the same loss to the employer and the employer terminates one employee and retains the other for a short while letting him retire thereafter. In such a

scenario, the view of the Petitioner is that it is not reasonable for the employer to only recover their losses from the employee that was terminated while not doing the same from the employee who was retained for a short while. Further, the Petitioner relies on an alleged practice of imposing punishment for minor misconduct without a formal inquiry during the disciplinary process conducted by the Bank. Likewise, the Petitioner complains that the failure of the Arbitrator to consider, among other evidence, the proof led by the Bank exposing the said practice is irrational. Anyhow, I am not inclined to give a broader interpretation to the related law as suggested by the Petitioner in view of accepting a proposition which hinders conducting a reasonable inquiry before imposing punishments. The overall submissions made on behalf of the Petitioner focuses as to how the Arbitrator has erred in law by not evaluating the evidence laid down on behalf of the Bank.

When considering the circumstances of this Application, there is ambiguity on whether the Bank did deduct the said sum of Rs. 250,000 either from the gratuity or the pension entitlements of the 4th Respondent. Even the issue of whether the respective loan mentioned in the said charges has been recovered or not is unclear to this Court. Section 13 of the said Payment of Gratuity Act deals with the forfeiture of gratuity, however, I am of the view that such provisions cannot be applicable due to the above uncertainty. Although the Petitioner indicates that there is an ambiguity between the Sinhala text and the English text of the said section 13, I take the view that the most prudent interpretation that should be given to the provisions of the above section 13 is that an employer is entitled to forfeit gratuity if all the three limbs below mentioned are fulfilled.

- a. There should be a termination of employment
- b. That termination should be for the reasons of fraud, misappropriation of funds of the employer, wilful damage to property of the employer, or causing the loss of goods, articles or property of the employer.
- c. The gratuity can be forfeited only to the extent of the above damage or the loss caused by the workmen

For the reasons given above, I cannot find that there is any element that is irrational, unreasonable or guilty of illegality in the decision of the Arbitrator who has arrived at the conclusion that the Bank should return the 4th Respondent a sum of Rs.250,000. I see no

reason to interfere with the facts which are in dispute in relation to the retention of a sum of Rs.250,000 by the Bank. On the other hand, I am not convinced with the Arbitrator's conclusion that the 4th Respondent should be given the interest rate paid by the Bank since the Arbitrator has failed to show a rationale in arriving at such an ambiguous decision. Thus, I hold that the 2nd relief granted by the Arbitrator is also irrational.

In the circumstances I proceed to issue a Writ of Certiorari quashing the decision of the Arbitrator reflected in the Award marked 'X10' and the Gazette Extraordinary marked 'X10b' only to the extent of quashing the 2nd, 3rd and 4th reliefs granted in favor of the 4th Respondent.

Application is partly allowed.

Judge of the Court of Appeal

Dhammika Ganepola J.

I agree.

Judge of the Court of Appeal