

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 a writ of certiorari in terms of Article 140 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

Sri Lanka Broadcasting Corporation
No. 574, Torrington Square
Colombo 7.

PETITIONER

CA (WRIT) Application No.398/2023

Vs.

1. Manusha Nanayakkara, MP
Hon. Minister of Labour and Foreign
Employment
Ministry of Labour and Foreign
Employment
6th Floor,
Mehewara Piyasa
Narahenpita
Colombo 5.
2. B.P. Prabath Chandrakeerthi
Commissioner General of Labour
Department of Labour
No.41,
Labour Secretariat
Kirula Road
Colombo 5.
3. D.G.K. Karunaratne
XB-10-1-2,
Edmonton Niwasa
Polhengoda
Colombo 6.

4. I.B. Fernando
No.85/5, Hospital Road
Seenawaththa
Aluthgama.

Respondents

Before: **N. Bandula Karunarathna J. (P/CA)**

&

B. Sasi Mahendran J.

Counsel: Asthika Devendra with Aruna Madhushanka and Vimukthi
Karunarathna for the Petitioner.

Navodi De Zoysa, SC for the 1st and 2nd Respondents.

Written Submissions: By the Petitioner - 17.07.2024.

By the Respondents – Not Filed.

Argued on : 01.04.2024.

Judgment on : 31.07.2024.

N. Bandula Karunarathna J. P/CA

This is an application for a writ of certiorari by the petitioner to quash the 3rd respondent's award dated 21.11.2022 marked as P-12(b) and the same contained in the 'Extraordinary Gazette Notification' bearing No. 2312/05 dated 27.12.2022 marked as P-12(c).

By the instant application, the petitioner is seeking to challenge and quash the purported arbitration award dated 21.11.2022 granted at the arbitration bearing No. A/ 61/2020 pertaining to the purported dispute between the petitioner and the 4th respondent which was referred to settlement by compulsory arbitration in which the 3rd respondent was appointed as the arbitrator.

The said award that was granted has been published in the Extraordinary Gazette bearing No. 2312/05 dated 27.12.2022.

In light of the provisions contained in section 31 DDDDD of the Industrials Disputes Act No. 43 of 1950 (as amended), a party is entitled to invoke the writ jurisdiction of this Court by way of an application seeking for a mandate in the nature of a writ of certiorari to challenge and quash an award granted at such arbitration upon the repudiation of the award. The said provisions are as follows:

Section 31 DDDDD (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."

Accordingly, to pursue relief prayed for in the instant application, the petitioner has now repudiated the impugned award via the documents marked as P-13(b) and P-13(c) following the procedure established under the Industrial Disputes Act/ No. 43 of 1950 (as amended).

It is submitted that the 2nd respondent had accepted and acknowledged the cheque [P-13(c)] by his communication dated 09.03.2023 and proceeded to publish the said repudiation in the Extraordinary Gazette Notification bearing No. 2326 / 14 dated 03.04.2023 pursuant to the provisions under section 20(2)(b) of the Industrial Disputes Act (as amended).

The background of the instant application is set out briefly as follows:

The 4th respondent joined the petitioner corporation on 17.06.1991 as 'Temporary Labourer' and he was made permanent in the post of 'Grade V Labourer' on 13.07.1994. Subsequently, he was appointed to the post of 'Grade II Library Attendant' and thereafter,

he was appointed as 'Grade I Library Attendant'. During his tenure as a 'Grade I Library Attendant', he was assigned with the additional tasks of 'Garden Supervisor' via letter dated 23.09.2010 (P-18). He was later vested with the cover-up acting duties of the 'Garden Supervisor' and was also assigned duties of supervision over building maintenance on 01-03.2011(P-19). On 18.02.2013 he was made permanent in the post of 'Garden Supervisor' at the board meeting No. 2013/03 and he was thereafter purportedly appointed as 'Garden Controller' at the board meeting No. 2013/04 held on 13.03.2013 (P-22). The 4th respondent had retired from service at the petitioner corporation on 10.12.2022 upon reaching the retirement age of 60 years (P-26).

An initial complaint was made to the Colombo Central Assistant Labour Commissioner on 17.08.2017 by the 4th respondent (several years later from the alleged decision, i.e. not placing him on a particular salary scale). An inquiry was conducted inter parte on 28.02.2018 upon the same and no amicable settlement was reached. As a result, it was then referred to the Industrial Relations Division. A written statement (P-3) was submitted for and on behalf of the petitioner, yet no settlement was arrived at. Consequently, the matter was referred to Compulsory Arbitration by the predecessor of the 1st respondent in terms of section 4(1) of the Industrial Disputes Act (as amended). The 3rd respondent hereof, one, D. G. K. Karunaratne was appointed as the Arbitrator by the predecessor of the 1st respondent.

The "Terms of Reference" for the arbitration were the following:

- a) Whether any prejudice has been caused to the 4th respondent by not placing him in the relevant salary scale for the position of 'Garden Controller' despite him having been appointed to and served in that particular position since 28.03. 2013 and
- b) if so, what remedies are available to him?

“ශ්‍රී ලංකා ගුවන් විදුලි සංස්ථාවේ වතු පාලක ලෙස සේවය කරන අයී. ඩී ප්‍රනාන්දු මහතා හට වතු පාලක තනතුර පිරිනමමින් ඊට අදාළ සේවය ලබා ගත්ත, ශ්‍රී ලංකා ගුවන්විදුලි සංස්ථා පාලන අංශය විසින්, එම තනතුරු අනුව නිමිවිය යුතු වැටුප් කාණ්ඩයේ නොපිහිටුවීමෙන් ඔහුට අසාධාරණයක් සිදු වී ඇත්ද යන්නත්, එසේ නම් ඔහුට නිමිවිය යුතු සහනයන් කවරේද, යන්නත් පිළිබඳවේ”.

At this juncture itself the petitioner states that the 4th respondent never functioned as Garden Controller.

The appeal of the 4th respondent along with documents marked X-01 to X-12 was tendered on 19.03.2021 and the answer of the petitioner dated 18.03.2021 was tendered in response thereto. The replication of the 4th respondent was tendered on 09.11.2021.

Thereafter, the inquiry took place in the following manner:

Evidence of the 4th respondent and the chairman of the petitioner was led on behalf of the complainant. Then, evidence of the assistant director — personnel and the

accountant were led on behalf of the petitioner. Consequently, the arbitral award was made on 21.11.2022 and it was published on the Extraordinary Gazette Notification bearing No. 2312/05 dated 27.12.2022.

The arbitral award dated 21.11.2022 stipulates inter alia that:

1. The 4th respondent shall be placed in the salary scale of MM 1-1 with effect from 14.05.2018.

“9.04 වන දින පැවැත්වූ සංස්ථා මණ්ඩල රැස්වීමේදී ගනු ලැබූ තීරණය අනුව R ලෙස ලකුණු කළ කොටසේ සඳහන් පරිදි ඉල්ලුම්කරු 2018.05.14 වන දින සිට 1 වැටුප් තලයේ පිහිටුවිය යුතු බවට නියෝග කරමි.”

2. He should be paid back wages (adjustment) from 14.05.2018 to 10.12.2021 (the date of his retirement).

“ඉල්ලුම්කරු අයි. බී ප්‍රනාන්දු යන අයට 2018.05.14 වන දින සිට 2021.12.10 වන දින දක්වා MM- 11 වැටුප් තලයේ පිහිටුවා ඊට හිමි වේතනාධික හා එම වැටුප් තලයට අදාළ අර්ථසාධක සහ භාරකාර අරමුදල් ලබාදීම සඳහා දෙවන පාර්ශ්වයට නියෝග කරමි. මෙසේ ගෙවීමේදී මේ වන විටත් ඉල්ලුම්කරුට MA 2-2 හිමිවූ දැනට ගෙවා ඇති වැටුප් අඩු කර MM -1-1 හි හා MA 2-2 හි වේතන පමණක් ගෙවන ලෙසට තීරණය කරමි”

3. Accordingly, the petitioner was required to pay Rs. 1,059,801 to the 4th respondent.

At the outset, even though one may argue that the 4th respondent was appointed to the post of 'Garden Controller' the said appointment was made under following circumstances.

1. There was no cadre vacancy existing for a post of 'Garden Controller' with the petitioner at the time of the appointment.
2. The 4th respondent does not have the required educational background and experience as qualifications to be placed in the MM 1-1 salary scale as mentioned below.
3. The 4th respondent by the document marked as P-25 read with the document marked as P-24 accepted to be appointed to the post of 'Garden Controller' whilst being placed in the MA 2-2 salary scale and thus he is now estopped from seeking otherwise, i.e. that he be placed in the salary scale of MM1-1.
4. As he was placed in the salary scale of MA 2-2, he has drawn and received overtime payments and daily wages which he would not be entitled to if he were placed at the MM 1 -1 salary scale.

It is apparent that the post of the 'Garden Controller' is non-existent. 'Garden Controller' was not a position that was prevalent in the cadre vacancies at the time of the appointment of the 4th respondent to the position.

The cadre vacancies published on 13.12.2010 (P-27) were applicable to the time period in which the said appointment of the 4th respondent was made. Despite the 4th respondent being sought to be appointed to the position of 'Garden Controller' on his own request [P-21], the petitioner was not in a position to place him in the salary scale of MM 1-1.

Even in the cadre of the petitioner which was declared soon after the purported appointment of the 4th respondent by the Department of Management Services via its document dated 25.10.2013 [P-28], there was no such position as 'Garden Controller'. Furthermore, it appears that the designations that attracted MM 1-1 salary scale were designations such as 'Engineer', 'Accountant', 'Librarian', 'Legal Officer', 'Secretary to the Board', etc.

It was stated that the Assistant Director of Human Resources of the petitioner corporation, gave evidence during the arbitration proceedings bearing No. A/ 61/2020 on behalf of the petitioner corporation and furthermore stated that the managerial level employees are not entitled to overtime payments and the 4th respondent was paid overtime payments because he was placed in the MA 2-2 grade and not the 'Middle Management' grade.

“ප්‍ර: ඒ අනුව තමන් ඉල්ලුම්කරුට අතිකාල දීමනා ගෙවීවේ මොකද? ඔහු කළමනාකාරණ සේවයේ නොවෙයි පිහිටා තිබෙන්නේ MA 2-2 කියන ශ්‍රේණියේ ?

පි: එහෙමයි ස්වාමිණි.”

We observed that the said position which was taken up by the petitioner corporation that the employees placed in MM 1-1 salary scale were not entitled to overtime payments and daily wages, has not been contravened during the cross-examination.

As regards the technical impossibility of the petitioner to place the 4th respondent in the MM 1-1 salary scale, it is clear that the position of 'Building Supervisor' was a cadre vacancy available at the time of the said appointment, which fell within the salary scale of MA 2-2. [P-27]

The salary scales of the petitioner were standardized and encoded by the 'Management Services Circular No. 30, in 2006 (P-29). The petitioner further states that the MA 2-2 salary scale accorded to the 'Building Supervisor' attracted a basic salary of Rs. 11,650. Moreover, the aforementioned basic salary of MA 2-2 was amended by Circular No.30 of 2009 (P-30) and increased up to Rs. 14,610.

The 4th respondent was informed by letter dated 05.04.2013 (P-24) that, he would be receiving a salary based on Rs. 14,610 - Rs. 25,310 which is the MA 2-2 salary scale, for his new position as the 'Garden Controller' despite the non-existence of such position according to any of the cadre vacancies of the petitioner approved by the Department of Management Services.

Hence, the petitioner was compelled to refrain from placing the 4th respondent on a salary under the category of MM 1-1 as such a position of 'Garden Controller' was not available in the cadre, and therefore, he was paid the salary of a supervisor (MA 2-2) since the position of 'Building Supervisor' was available in the cadre, it is further submitted that similar workmen who belonged to this category were treated the same as they were also placed in the salary scale of MA 2-2. [P-31]

Therefore, the petitioner was never in a position in any manner whatsoever to place the 4th respondent at a salary scale that belonged to positions of a different management category or for a position that never existed in the list of approved cadre vacancies at the time of the impugned appointment. In fact, it is evident that it was an erroneous decision made by the then members of the board to appoint the 4th respondent to the position of 'Garden Controller' given that the said position was not an available vacancy in the cadre of the petitioner corporation.

Thus, the appointment of the 4th respondent to the position of 'Garden Controller' is already an illegal decision and it cannot be ratified by an order compelling the petitioner either to place him at the scale of MM 1-1 or to pay him whatever the remaining portion of the salary of a MM 1-1 category deducting his already paid salary especially considering the fact that he has not been ill-treated or placed at any disadvantage and he was well aware of his circumstances in accepting the purported appointment.

It is technically impossible for the 4th respondent to be entitled to the MM 1-1 salary scale as the "Middle Manager" salary scales (MM 1-1, MM 1-2 and MM 1-3) fall within the ambit of the employee category of "Manager". For an employee to be placed in a salary scale of the "Manager" category, one should have a degree that is recognized by the University Grants Commission in the relevant field, apart from other required qualifications.

The 4th respondent was already an employee of the petitioner and for him to be entitled to a "Middle Manager" salary scale he must have had the qualifications of an 'Internal Candidate' set out as follows.

1. Having obtained the qualifications required by the external candidates above,
2. upon completion of minimum 5 years' satisfactory service in a post as a 'Junior Manager' (1M category), in the subject area relevant to the post.
3. If a candidate does not have a satisfactory service record of a 'Junior Manager' post for 5 years, such candidate must meet the requirements and qualification of an 'External Candidate'.

Therefore, the qualifications required to be an 'External Candidate' are as follows:

1. A degree in the relevant field (the subject area should be mentioned) which is recognized by the U.G.C. and minimum of one year, post qualifying experience in the relevant field to the post after obtaining the first degree or

2. having passed the intermediate examination of a recognized professional chartered institute, of which the subject area is relevant to the post and a minimum of one year, post qualifying experience in the relevant field to the post or (for a post related to technical field),
3. having obtained a certificate of proficiency not below than the National Vocational Qualification Level 7 issued by a technical/ vocational training institute accepted by Tertiary and Vocational Education Commission and a minimum of one-year, post-qualifying experience, in public service/ at a corporation, at a statutory board/institution or a recognized institution or
4. Upon completion of minimum of 5 years of satisfactory service in a post in the Junior Manager (JM) Category, in the subject area relevant to the post.

It was submitted that the 4th respondent has completed his school education only up to Grade 10 and he did not possess any academic or professional qualification that would entitle him to be placed at the MM 1-1 salary scale.

Furthermore, the proceedings dated 21.02.2021 elicit the fact that the minimum qualification required for the MM 1-1 salary scale is a degree and the highest education the 4th respondent has received is secondary education up to Grade 10. Thus, the 4th respondent is estopped from claiming to be placed in MM 1-1 salary scale.

The 4th respondent by his letter dated 18.04.2013 had accepted the petitioner's offer to appoint him as the 'Garden Controller' upon his own appeal dated 26.02.2013 (P-21). Given such acceptance by the 4th respondent only was he appointed as the Garden Controller of the petitioner corporation. Moreover, it was submitted that the 4th respondent in fact consented to be placed in the salary scale of MA 2-2. Therefore, it is the petitioner's contention that the said acceptance by the 4th respondent has estopped him from claiming to be placed in the salary scale of MM 1-1 later.

In that case, the 4th respondent fails to be entitled to the MM 1-1 salary scale. It can be reasonably assumed that the 4th respondent accepted to be placed in the MA 2- 2 salary scale as he was well aware that he cannot be placed at a different salary scale, specifically, MM 1-1 salary scale as was sought by him.

As the 2 maxims 'lex non cogit ad impossibilia' (the law does not compel the performance of what is impossible) and 'ad impossibilia nemo tenetur' (no one is bound to an impossibility) state, it was impossible for the petitioner to place the 4th respondent at the MM 1-1 salary scale due to the nonexistence of the position of 'Garden Controller' in the cadre of the petitioner and it was impossible for the 4th respondent to be entitled to the MM 1-1 salary scale owing to his lack of educational qualifications.

The maxims aforementioned are very much celebrated and well-established legal principles and as per Maxwell on Interpretation of Statutes quoted in Madurasinghe v. Madurasinghe (1988) 2 S.L.L.R. 142, 'lex non cogit ad impossibilia' is understood as

dispensing with the performance of what is prescribed when the performance of it is impossible.

In the case of Eksath Engineru Saha Samanya Kamkaru Samithiya v. De Silva; 73 NLR 260 it was held as follows:

‘He submitted therefore that mandamus should not therefore issue ordering them to function as an Industrial Court as they were now not qualified to do so. I think there is substance in this submission. Parties obviously cannot be ordered to do what they are not qualified to do and are therefore unable to do. Lex non cogit ad impossibilia. The application is therefore dismissed but without costs.’

Thus, the petitioner suffered from the impossibility and inability of placing the 4th respondent at the salary scale of MM 1-1, both as there was no cadre vacancy for the position of 'Garden Controller' and the 4th respondent had not fulfilled required qualifications and the necessary experience to be entitled to the MM 1-1 salary scale. Therefore, in this instance, the petitioner was not bound to perform the impossibility (ad impossibilia nemo tenetur) and the 4th respondent is estopped from claiming back wages under MM 1-1 salary scale.

It seems that the 2nd and 3rd respondents have failed to take cognizance of the actions of the 4th respondent that disentitles him to claim back wages which, in brief are that;

- a. the 4th respondent himself sought for and accepted a post which was non-existent;
- b. he accepted a post that he neither had qualifications nor experience to hold and;
- c. he accepted on his own accord to be placed in a salary scale which is MA 2-2 and obtained the benefits of being placed in the MA 2-2 salary scale which the 3rd respondent had deliberately failed to consider.

It is apparent that the petitioner had expressly communicated to the 4th respondent that he would be placed at the MA 2-2 salary when he was offered the position of 'Garden Controller' and the 4th respondent willingly, expressly and unconditionally accepted the said condition of him being placed at the MA 2-2 salary scale, by the letter marked as P-25.

Moreover, during his tenure at the petitioner-corporation as the 'Garden Controller' the 4th respondent was paid an aggregated gross salary of Rs.5,983,325.44 from 2013 to 2020 including overtime payments and daily wages as evident by the documents marked R3 to R10 during the arbitration proceedings dated 28.12.2021, which are the pay sheets of the 4th respondent that have been admitted by the 4th respondent during the arbitration and the same was further encapsulated via written submissions of the petitioner.

In spite of the fact that an officer of the petitioner who claims to fall within the ambit of the MM 1-1 salary scale (Executive Grade/ Middle Management) is not entitled to obtain payment for overtime, the 4th respondent requested the payment of daily wages for weekends and the said request was entertained by the petitioner only because the 4th

respondent had been placed at the MA 2-2 salary scale vide Chapter VIII of the Establishment Code Volume I.

“පහත දැක්වෙන නිලධාරී වර්ගවලට අතිකාල ගෙවීම් හිමිනොවේ.

මාණ්ඩලික නිලධාරියෙකු.

ක්ෂේත්‍ර නිලධාරියෙකු : එනම් ප්‍රධාන වශයෙන් ක්ෂේත්‍ර වැඩකටයුතු පැවරී ඇති, එක් ස්ථානයකට සීමා නොවන, යම් කාර්යාලයක සීමාවලින් පිටත පිහිටි වැඩබිම්වලට නිතිපතා යා යුතු අධීක්ෂණ ස්වභාවයේ රාජකාරි පැවරී ඇති, පරීක්ෂණ, වාරිකා යනාදිය සිය රාජකාරියට ඇතුළත් නිලධාරියෙකු...”

It is observable that from 2013 to 2020 the 4th respondent has obtained overtime payments and daily allowances which aggregated to a sum of RS. 2,151,283.50 as evident by the document marked as P-33(a). The 4th respondent was paid an aggregate salary of Rs. 607,799.33/for the year 2021 till his retirement. In addition, the 4th respondent had requested mobile phone allowances.

Therefore, having already enjoyed the benefits and privileges that are not available for employees placed under the MM salary scale owing to the fact that the respondent was placed in the MA 2-2 salary scale, the 4th respondent is estopped from claiming back wages under the MM 1-1 salary scale.

Furthermore, given the conduct of the 4th respondent, no legitimate expectation could accrue to the 4th respondent as he unconditionally consented to be placed in the salary scale of MA 2-2 and he enjoyed the benefits that came along with the said salary scale.

While reiterating the above, in awarding back wages the 3rd respondent has not even considered a reduction considering the drawing of these payments by the 4th respondent which does not stand to reason.

As stated above the 4th respondent had accepted the purported appointment willingly while being placed under the salary scale of MA 2-2 and went on to obtain overtime payments and daily wages and after some time thereafter, sought to be placed in the salary scale of MM 1-1 while obtaining the above payments. This conduct of the 4th respondent, disentitles him of obtaining the reliefs that he claimed before the 3rd respondent.

After having unconditionally accepted the post of 'Garden Controller' whilst being placed in the salary scale of MA 2-2 and having enjoyed the benefits accorded with the said salary scale, and thereafter, after several years (2013 and 2017 respectively), seeking himself to be placed in the salary scale of MM 1-1 by way of an industrial arbitration questions the integrity of the 4th respondent.

Hence, the 4th respondent has not gone to seek relief from arbitration with clean hands and it is a cardinal principle in law that "he who comes to equity must come with clean

hands" and in fact, it is obvious that he has not sought relief from industrial arbitration with pure intention.

In the case bearing No. SC Appeal 145/2013 it was cited:

"He who comes into equity must come with clean hands. A court of equity will refuse relief to a plaintiff whose conduct in regard to the subject matter of the litigation has been improper. (Vide Arunima Barnah Union of India [2007] 6 SCC 120)"

Moreover, given the circumstances, it is apparent by the conduct of the 4th respondent that he has acted mala fide and has attempted to enrich himself unjustly.

The 3rd respondent has failed to appreciate the 'Terms of Reference' correctly.

The 'Terms of Reference' of the purported arbitration states the following.

'Whether any prejudice has been caused to the 4th respondent by not placing him in the relevant salary scale for the position of 'Garden Controller' despite him having been appointed to and served in that particular position since 28.03.2013, if so, what remedies are available to him?'

The aforesaid 'Terms of Reference' is based on the issue whether the 4th respondent was firstly appointed to the position of 'Garden Controller' and then whether his services were obtained in the said position as aforesaid.

However, as stated, even though a purported letter of appointment has been issued it is evident that there was no carder vacancy; there was no work in a position named 'Garden Controller' and from the payments the 4th respondent had obtained, it is clear that he would have been involved in other work considering the fact that he obtained overtime payments and daily wages which are not entailed in middle management positions.

Thus, in arriving at the impugned award the 3rd respondent had failed to appreciate the fact that the 4th respondent never served in the capacity of 'Garden Controller' and hence is not entitled to the award in question in these proceedings.

Owing to the above, it can be inferred that,

- a) the post of 'Garden Controller' is non-existent;
- b) it is technically impossible for the petitioner to place the 4th respondent at the MM 1-1 salary scale;
- c) it is technically impossible for the 4th respondent to be entitled to the MM 1-1 salary scale;

- d) the 4th respondent is estopped from claiming back wages under MM 1-1 salary scale;
- e) the 4th respondent is not entitled to obtain back wages considering his behaviour;
- f) the 3rd respondent has failed to appreciate the 'Terms of Reference' correctly.

Thus, this Court is inclined to issue a writ of certiorari quashing the award of the 3rd respondent dated 21.11.2022 marked as P-12(b) and the same contained in the Extraordinary Gazette Notification bearing No. 2312/05 dated 27.12.2022.

This application of the Petitioner is therefore allowed.

No order for cost.

President of the Court of Appeal

B. Sasi Mahendran J.

I agree.

Judge of the Court of Appeal