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

In the matter of an Application for an Order in the nature of a Writ of *Certiorari* under Article 140 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

Court of Appeal Case No.

CA/WRT/0555/2019

Upali Newspapers (Private) Limited,

No. 223, Bloemendhal Road,

Colombo 13.

Petitioner

Vs

1. **Dinesh Gunawardana**,
   Minister of Skills Development,
   Employment and Labour Relations.
   Labour Secretariat,
   Narahenpita,
   Colombo 5.

2. **D.M. Sarath Abayagunawardana**,
   Secretary, Minister of Skills Development,
   Employment and Labour Relations,
   Labour Secretariat,
   Narahenpita,
   Colombo 5.

3. **R. P. A. Wimalaweera**,
   Commissioner General of Labour,
   Department of Labour,
   Colombo 5.

4. **S. Liyanage**
   Arbitrator,
   No 13/30, Sarwodaya Mawatha
   Kesbewa,
   Piliyandala.

5. **T. D. Tissa Gunasena**,
   No. 121/G/5,
   Swarna Jayanthi Mawatha,
   Asgiriwalola,
   Udugampola.

6. **H.K.M.T.K. Dharmadasa**,
   No. 121/G/5,
   Swarna Jayanthi Mawatha,
   Asgiriwalola,
   Udugampola

7. **K. Premasiri**,
   No. 39/73,
   Nelson Lane,
   Colombo 03.

8. **M. B. K. Randeniya**,
   No. 256/2,
   Tissadeniya, Ambilmeegama
   Pilimathalawa.

9. **R. L. P. B. Wijayanama**,
   No. 38/2/B,

Naranwala,
Gampaha.

10. **H.V. Hemalatha**,
    No. 1116/06, 9th Lane,
    Wickremasinghepura, Battaramulla.

11. **M. K, G. Wasantha Kumara**,
    No. 171/1.
    Padiliyathuduwa Road,
    Hunupitiya,
    Wattala.

12. **T. G. P. Peiris**,
    No. 441, Galle Road,
    Nalluruwa,
    Panadura.

13. **J. W. Pushpakumara**,
    "Shashikala", Nelligoda,
    Karagoda,
    Uyangoda.

14. **L. W. Athukorala**,
    No. 63/B,
    Kothalawala,
    Vihara Mawatha,
    Kaduwela.

15. **The Hon. Attorney General**,
    Attorney General's Department.
    Colombo 12.

Respondents

Before: **M. T. MOHAMMED LAFFAR, J.**
S. U. B. Karalliyadde, J

Counsel: Nalin Amarajeewa, instructed by Samarathne Associates for the Petitioner.

Saliya Edirisinghe for the 5th – 14th Respondents. M. Amarasinghe S.C. for the State.

Argued on: 04.08.2022 & 27.07.2023.

Written Submissions on: 04.10.2023 By the Petitioner.

18.09.2023 By the 5th – 14th Respondents.

Decided on: 23.11.2023

MOHAMMED LAFFAR, J.

The Petitioner is seeking *inter-alia,* a Writ of Certiorari quashing the Notifications marked as **P10, P11, P12 and P13**.

By **P10**, the Secretary to the Ministry of Labour and Trade Union Relations by letter dated 24-04-2018 informed the Petitioner that the Minister of Labour, by virtue of the powers vested in him by Section 4 (1) of the Industrial Disputes Act, No. 43 of 1950 (as amended) referred the Industrial Dispute between the Petitioner (employer) and the 5th to 14th Respondents (employees) to the Arbitrator (4th Respondent). **P12** is the reference made by the Minister of Labour to the Arbitrator in respect of the said Industrial Dispute, which is reproduced as follows;

"Whether the 10 employees (5th to 14 Respondents) have been caused injustice by the earlier practice of payment of gratuity based on one

month's salary per year for employees retiring with a service period of more than 10 years at the Upali News Papers, being changed to half a month salary per year and if such injustice has been caused, to what reliefs they are entitled."

P11 is the notification of the Commissioner of Labour with regard to **P12.** The Notice dated 18-05-2018 dispatched by the 4th Respondent to the Petitioner as to the said Arbitration proceedings is marked as **P13**.

It is pertinent to note that the Petitioner is not seeking to quash the Arbitral Award made by the 4th Respondent. In this context, when the matter was taken up for argument on 31-03-2022, the learned Counsel for the Petitioner, the learned State Counsel for the 1st to 3rd Respondents and the learned Counsel for the 5th Respondent consented to confine the issues only to the question of law as set out below;

"Whether the reference made by the Minister of Labour to the Arbitrator is bad in law ***(P12)"***

The learned Counsel for the Petitioner contended that the reference made by the Minister of Labour to the Arbitrator is erroneous and misconceived in law on the basis that;

(i). The Minister under Section 4 (1) of the Industrial Disputes Act only has the power to refer a "live Industrial Dispute" for settlement by Arbitration, and there was no "live Industrial Dispute" at the time of reference to Arbitration, because the dispute which related to the payment of enhanced gratuity arose after the 10 workmen had ceased to be employees, and there cannot be a "live Industrial Dispute" between the employer and ex-employees.

(ii). In terms of the Payment of Gratuity Act No. 12 1983, the Commissioner General of Labour is the sole authority to determine matters relating to the payment of gratuity including enhanced gratuity, and as such, it was *ultra vires* the powers of the Minster to refer to an Arbitrator for settlement by Arbitration under Section 4(1)

of the Industrial Disputes Act a dispute relating to the non-payment of enhanced gratuity.

At first, I refer to the first ground of contention of the learned Counsel for the Petitioner stating that the reference made by the Minister is contrary to the provisions of the Industrial Disputes Act on the basis that the dispute related to this Application is not a live dispute.

In this regard, I refer to the observation made by the Supreme Court in **De Costa Vs. ANZ Grindlays Bank PLC [1] (G.P.S.De Silva Cj, Dheeraratne J & Ramanathan J)** that;

> *"A dispute in regard to a claim for "gratuity" can arise only upon the cessation of employment (as a retiral benefit or terminal benefit). The contention advanced on behalf of the 1st respondent Bank that the Minister has no power to refer the present dispute for settlement by arbitration because the dispute that arose after the appellant resigned from service is not well-founded in the context of a dispute relating to a claim for gratuity. Hence the reference to arbitration under Section 4(1) of the Industrial Disputes Act, by the Minister was not in excess of his powers (not ultra vires)."*

The learned Counsel for the Petitioner relied upon the following judgments of apex Courts;

The State Bank of India Vs. Sundaralingam[2], where it was held that

> *"An arbitrator appointed by the Minister under Section 4 (1) of the Industrial Disputes Act has no jurisdiction to entertain an alleged industrial dispute between an employer and an ex-employee who has already retired from the services of the employer and thus ceased to be an employee. Such a case is one of cessation of employment and not one of termination or reinstatement. and, therefore, is not an "industrial dispute ".*

[1] 1996 (1) SLR- p307.
[2] 73 NLR 514.

In **ANZ Grindlays Bank PLC Vs. Minister of Labour**[3] it was enunciated by the Court of Appeal that

> *"there was no Trade Dispute or any dispute at the time the Employee tendered his resignation. A dispute can be referred for settlement only if the Dispute arose while the relationship of Employer-Workman subsists. The Minister cannot act under S4(1) where there was no industrial dispute Ping at the time when the Workman ceased to be an employee"*

In the case of **Perera Vs. Standard Chartered Bank**[4] the Supreme Court decided that

> *"a dispute that had arisen while the contract of employment existed could be referred for settlement even though the contract had been later terminated and whether such termination had been initiated or brought about by the employer or by the workman himself".*

It is pertinent to note that the Supreme Court in the De Costa (Supra) case had considered the aforesaid judgments in the cases of State Bank of India and Perera. The observation made in ANZ Grindlays Bank PLC Vs. Minister of Labour (Supra) was by the Court of Appeal, and therefore, this Court is bound to adhere to the observation made by the Supreme Court in the De Costa case.

Thus, it is settled law that a dispute that had arisen while the contract of employment existed or a dispute that is connected to the contract of employment and had arisen after the termination/resignation of employment is an Industrial Dispute in terms of the provisions of the Industrial Dispute Act.

In the instant Application, the 5th to 14th employees had worked for the Petitioner for more than ten years, and after they retired, they were not paid a gratuity based on one month's salary per year of service as was the earlier practice. They were paid half month's salary per year of service. These Respondents complained to the

[3] 1995 (2) SLR- 53.
[4] 1995 (1SLR) 73.

Commissioner of Labour. Since the Petitioner failed to pay the enchanted gratuity, under Section 4 (1) of the Industrial Disputes Act, the Minister referred the dispute to the 4th Respondent, Arbitrator.

In these circumstances, I hold that despite the question of payment of gratuity to the 5th to 14th Respondents had arisen after their retirement, as this issue is connected to the contract of employment, existed between the Petitioner and these Respondents, the reference made by the Minister to the Arbitrator is within the purview of the Industrial Disputes Act.

Secondly, the learned Counsel for the Petitioner contended that in terms of the Payment of Gratuity Act, No. 12 of 1983 (as amended) the Commissioner of Labour is the sole authority to determine matters relating to an enhanced gratuity. In the instant case, if the 5th to 14th Respondents had made an Application to the Commissioner of Labour under the provisions of the Payment of Gratuity Act, indeed, the Commissioner of Labour was the authority to determine the enhanced payment of gratuity to them. However, the 5th to 14th Respondents did not make an Application to the Commissioner of Labour under Section 10 of the Gratuity Act. An Application was made to the Commissioner of Labour in terms of the provisions of the Industrial Disputes Act. In these circumstances, under Section 4 (1) of the Industrial Disputes Act, the Minister has powers to refer any industrial disputes to an Arbitrator. It is to be noted that Section 48 of the Industrial Disputes Act has not excluded the dispute in relation to enhanced gratuity, which reads thus;

*"industrial dispute " means **any dispute** or difference between an employer and a workman or between employers and workmen or between workmen and workmen connected with the employment or non-employment, or the terms of employment, or with the conditions of labour, or the termination of the services, or the reinstatement in service, of any person, and for the purposes of this definition " workmen " includes a trade union consisting of workmen."*

This position is substantiated in the case of **De Costa Vs. ANZ Grindlays Bank PLC** (Supra) as well.

For the foregoing reasons, I hold that the Petitioner's Application is devoid of merits and liable to be dismissed. The Application is dismissed without costs.

Application dismissed. No costs.

JUDGE OF THE COURT OF APPEAL

S. U. B. Karalliyadde, J

I agree.

JUDGE OF THE COURT OF APPEAL