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

C.A. WRIT/ 74/2019

Piramal Glass (Ceylon) PLC.

No.148,

Maligawa Road,

Rathmalana.

PETITIONER

-Vs-

1. A. Wimalaweera
   Commissioner General of Labour
   Department of Labour,
   Colombo 05.

2. D. M. Hewawithana
   Asst. Commissioner of Labour
   No. 90,
   7th Cross Street,
   Panadura.

3. B. K. Wimalasiri
No. 85, Kaharapitiya,
Kananwila,
Horana.

RESPONDENTS

BEFORE : A.H.M.D. Nawaz, J (P/CA) &
Sobhitha Rajakaruna, J.

COUNSEL : Murshid Maharoof with Malinda Dhanansooriya for the Petitioner.
Dr Charuka Ekanayake for the 1st and 2nd Respondents
Tharanatha Palliyaguruge for the 3rd Respondent.

Decided on: 25.11.2020

A.H.M.D. Nawaz, J. (P/CA)

The Petitioner - a company incorporated in Sri Lanka as *Piramal Glass Ceylon PLC* seeks a writ of *certiorari* to quash the decision made by the 1st Respondent Commissioner General of Labour (P13) by which he ordered the Petitioner to pay gratuity to the 3rd Respondent. A quashing order is also sought to annul the subsequent order marked P15, which followed P13.

Both orders made by the Commissioner General of Labour (P13 and P15) impose the liability on the Petitioner to pay gratuity to the 3rd Respondent for the period he worked in the US, for a company called *Piramal Glass-USA, Inc.* It is this imposition

of liability to pay gratuity for the period of service in the US that is the bone of contention in the case. The imposition of liability for services rendered for the Petitioner company is not disputed by the Petitioner.

Whilst the Petitioner admitted its liability to pay gratuity to the 3rd Respondent for his services rendered in Sri Lanka between 1994 and 2012, the consistent position of the Petitioner before the Commissioner General of Labour and this Court has been a denial of such liability to pay gratuity for the period the 3rd Respondent worked for the US Company. As is apparent, the Sri Lankan company and the US corporate are subsidiaries of an Indian Parent Company known as *Piramal Glass Private Limited (India)* and both bear the identical names but with different suffixes. Whilst the Sri Lankan subsidiary is known as *Piramal Glass Ceylon PLC*, the US subsidiary goes as *Piramal Glass-USA, Inc.* As the suffix ***PLC*** indicate, the Sri Lankan subsidiary trades on the Colombo Stock Exchange (CSE) as a public quoted company whose principal activity is the manufacture and sale of glass containers.

Admittedly the 3rd Respondent employee worked for both companies with distinction and he contends that the Sri Lankan subsidiary becomes liable to pay gratuity - a liability imposed by *Payment of Gratuity Act No. 12 of 1983* even for the services he rendered for the US subsidiary company. His basic argument is that since he secured employment in the US with the US subsidiary and until he ceased his period of service in the US on 20.12.2016, the Petitioner company in Sri Lanka had continued to be his employer because he had only been transferred to the US company and therefore his employment with the Sri Lankan company had continued since then. So, the liability for gratuity must be casted upon the Sri Lankan employer despite the fact the Sri Lankan employer never received the

benefit of his services in Sri Lanka. This was the crux of the argument of the 3rd Respondent.

Thus, the contention of the 3rd Respondent has been one of transfer to the US subsidiary, whilst the argument of the Petitioner company is that when the 3rd Respondent began to work for the US subsidiary from 31st January 2013, it was consequent to a new contract of employment with the US subsidiary in the US. The Commissioner General of Labour has agreed with the stance of the 3rd Respondent and the document P13 contains that decision, which is impugned and sought to be quashed by *certiorari*. In order to advance this argument of transfer, the decision of the Commission of Labour (P13) relies on P2 - a letter dated 20 December 2012 wherein one Sanjay Tiwari, CEO and Executive Director of the Sri Lankan Petitioner Company has written to the 3rd Respondent employee in the following tenor-

"We are pleased to inform you that you are transferred to Piramal Glass-USA, Inc, for 2 years starting from 1st January 2013." (sic).

This letter (P2) is invoked as the pivotal document evincing the intention of the Sri Lankan subsidiary to transfer the 3rd Respondent to the US subsidiary. The learned State Counsel placed much reliance on this document as did the learned Counsel for the 3rd Respondent to support the order (P13) made by the Commissioner General of Labour.

The learned Counsel for the Petitioner company (the Sri Lankan subsidiary) contended that the new contract of employment which was signed by the 3rd Respondent on 31.01.2013 in the US (the document marked P3) made him an

employee of the US subsidiary and therefore no liability of gratuity could be imposed on the Petitioner to pay for his services in the US.

Thus, there are two rival arguments and the issue before this Court boils down to the question of who the employer of the 3rd Respondent was when he began to work for the US subsidiary as from January 31, 2013. Did the employment of the 3rd Respondent with the Sri Lankan subsidiary continue even though he began to render his services for the US subsidiary? These are questions that emerge in the case and the tenor of the decision of Commissioner General of Labour (P13) is to the effect that there was no new contract of employment since there was a transfer and, in such circumstances, it becomes the liability of the Sri Lankan subsidiary (the Petitioner) to pay gratuity for the services rendered in the US.

In judicial review such as an application for a writ of *certiorari* which is to quash a decision, the inquiry of the reviewing court is to scrutinize the decision-making process. Did the decision maker in arriving at the decision take into account relevant considerations and not irrelevant considerations? Did he understand the law correctly? Did he give reasons for his decision? Did he pose the right questions? Did he make a material error of fact? In fact, the new emerging trend is material error of fact as it is acknowledged today that much of the tension may be resolved with the emerging doctrine that to make a material error of fact may be to make an error of law. Wade & Forsyth state in Administrative Law (11th edn, 2014) at page 230 that mere factual mistake has become a ground of judicial review, described as 'misunderstanding or ignorance of an established and relevant fact' or 'acting upon an incorrect basis of fact'-See: *R* v. *Immigration Appeal Tribunal ex p Khan (Mahmud)* [1983] QB 790; *R (Bahrami)* v. *Immigration Appeal Tribunal* [2003] EWHC 1453; See also Forsyth and Emma Dring, 'The Final Frontier: The Emergence of Material Error of Fact as a Ground of Judicial Review in Forsyth, Elliot, Jhaveri,

Ramsden, and Scully-Hill (eds.), *Effective Judicial Review: A Cornerstone of Good Governance* (2010) at 245.

To all intents and purposes, the import of P13 -the decision of the Commissioner of Labour conveys the decision that the same employer (*Piramal Glass, Ceylon PLC*) has continuously employed the 3rd Respondent from 7/3/1994 (the date on which the 3rd Respondent had joined the Sri Lankan company) to 20/12/2016 – the date on which the 3rd Respondent left the service of *Piramal Glass- USA, Inc.* It is on this premise that the Sri Lankan company, *Piramal Glass Ceylon PLC* has been ordered to pay gratuity for the period between 07/03/1994 and 20/12/2016. Thus, this period covers not only the duration during which the Petitioner worked for the Sri Lankan subsidiary (7.03.1994-20.12.2012) but also the period of service for the US subsidiary (31.01.2013-20.12.2016).

The Petitioner – the Sri Lankan subsidiary company contended that P13 and P11 which preceded P13, are *ultra vires* and illegal inasmuch as P13 has taken into account the services of the 3rd Respondent which was rendered for the benefit of the US Company between 31/01/2013 and 20/12/2016. It was the contention of the learned Counsel for the Petitioner that the services that were performed in the US by the 3rd Respondent between 31st January 2013 and 20th December 2016 were for a different company called *Piramal Glass -USA, Inc.* and the Sri Lankan company, *Piramal Glass Ceylon PLC* was not the beneficiary of the services that were thus performed in the US. As such, no liability for payment of gratuity could be cast upon the Sri Lankan company - *Piramal Glass Ceylon PLC* (the Petitioner).

So the question arises whether the *Piramal Glass Ceylon PLC* and *Piramal Glass USA Inc.* are one and the same employers of the 3rd Respondent and if they are one and the same, it would appear that the 3rd Respondent continuously worked for one and the same entity from 1994 to 2016.

If the US company is, in fact and law, a corporate entity engulfed in the form and personality of the Sri Lankan company, one would not quarrel with the Commissioner of Labour when he concluded that the 3rd Respondent had worked continuously for the same employer. One would also not fault the Commissioner of Labour (the 1st Respondent) for his reasoning if the two companies were inextricably interwoven by a legal nexus. Even if there had existed between the two entities a relationship of agency, one could advance the argument that the US subsidiary employed the 3rd Respondent for and on behalf of the Sri Lankan subsidiary-the Petitioner in the case.

The factual matrix in the case and the resultant legal position militate against this position. The decision P13 ignores the cardinal principle adumbrated in the seminal case of ***Salomon v Salomon*** (1897) AC 22, where the House of Lords declared that on incorporation, a company becomes a legal entity separate and distinct from its shareholders.

Lord Macnaghten stated thus in the case:

> *[t]he company is at law a different person altogether from the subscribers ...; and, though it may be that after incorporation the business is precisely the same as it was before, and the same persons are managers, and the same hands receive the profits, the company is not in law the agent of the subscribers or trustee for them. Nor are the subscribers, as members liable, in any shape or form, except to the extent and in the manner provided by the Act.*

Even in a group situation as we encounter in this case, the concept of separate legal entity would hold true in the case of the two subsidiaries of *Piramal Glass* the holding company which is located in India. While subsidiaries of a parent company are located in several parts of the world, like Sri Lanka and the US, in no way could one subsidiary be classified as the alter-ego of the other subsidiary. In other words, the doctrine of separate legal entity mandates that the Sri Lankan subsidiary cannot be equated to the US subsidiary, even if they do conduct the same business of making glassware. This was pithily expressed in ***The Albazero*** case (1977) 774 where Roskill LJ stated:

> *"Each company in a group of companies .....is a separate legal entity possessed of separate legal rights or liabilities.."*

It is thus indisputable that each company in this group are in law separate legal entities. The Companies Act contain no provision for disregarding the separate legal personality, unlike Section 20 (9) of the Companies Act 2008 of South Africa (see Dame Mary Arden: Piercing the Corporate Veil-Old Metaphor, Modern Practice? 2017 (1) JCCL & P 1).

Therefore the Sri Lankan subsidiary was not present in the US and when the 3rd Respondent went to work for *Piramal Glass -USA, Inc*, his services at *Piramal Glass Ceylon PLC* had come to an end.

If at all, the decision that both companies are one and the same could be arrived only by piercing the corporate veil. The English courts went into the device of piercing the corporate veil in a number of cases and in such cases, in deciding whether a company is present in a foreign country by a subsidiary, the Court often investigated the relationship between a parent company and a subsidiary company in those cases

to determine whether the subsidiary was acting as the parent's agent and, if so, on what terms. This court is though dealing with two subsidiary companies with the parent located in India.

The principles adumbrated in the majority of veil lifting cases which involved a parent and a subsidiary would equally apply to a case such as the instant case where two subsidiaries are involved. A paradigm case that settled and cleared the uncertainty surrounding veil lifting is the English Court of Appeal decision of *Adams v Cape Industries Plc.* (1990) 1 Ch. 433. The English Court of Appeal made it quite clear that there has to be some clarity about a statute or document which would allow the Court to treat a group as a single entity. Absent such clarity, the courts would be too slow to lift the corporate veil. The court concluded that:

> *"Save in cases which turn on the wording of particular statutes or contracts, the court is not free to disregard the principle of Salomon v. Salomon & Co Ltd (1897) AC 22 merely because it considers that justice so requires. Our law, for better or worse, recognizes the creation of subsidiary companies, which though in one sense the creatures of the parent companies, will nevertheless under the general law fail to be treated as separate legal entities with all the rights and liabilities which would normally attach to separate legal entities..."*

So it is unambiguously clear that each subsidiary company is separate and distinct not only from its parent but also from any other subsidiary in the group. Only in exceptional circumstances one company would be equated as the alter ego of the other company and it is settled from one of the exceptions given in *Adams v Cape Industries Plc* (supra) that either the statute or contract must unambiguously permit the separate two personalities to merge into one single entity.

The seminal decision of *Adams* narrowed the situations where the veil of incorporation is in effect lifted to 3 situations.

- Where the court is interpreting a statute or document.
- Where the company is a mere façade.
- Where the subsidiary is an agent of the Company.

This is not a case where this court is called upon to interpret a statute which turns on lifting the corporate veil. If at all, the question arises whether on an interpretation of any contract between the Sri Lankan subsidiary and the 3rd Respondent or among the parties in the case, this Court can lift the corporate veil between the Sri Lankan subsidiary and the US subsidiary and treat them both as one and the same entity. I must say that the documents available in the case that were put forward before the Commissioner of Labour do not permit this court to arrive at the interpretation that the US subsidiary should be treated as an extension of the Sri Lankan subsidiary. What are these documents that are before this Court?

Both the learned State Counsel who defended the order of the General Commissioner of Labour and the learned Counsel for the 3rd Respondent sought to place emphasis on the very words the Commissioner reiterated in his order (P13) – "The Petitioner was transferred". In other words, the argument was that there was an intra-group transfer from one subsidiary to another subsidiary. Both the State Counsel and the Counsel for the 3rd Respondent pointed out that the use of the term 'transfer' in P2 dated 20/12/2012 connotes that the employment of the 3rd Respondent at the Petitioner company continued uninterrupted in the US subsidiary. The learned Counsel for the Petitioner sought to argue that the Petitioner company issued this letter P2 to the 3rd Respondent in order to facilitate the procurement of an L1 visa to the United States. It was the position of the

Counsel for the Petitioner that L1 visas to the United States are granted only if an employee goes on transfer. I must state that the 3rd Respondent would have certainly used this document in order to obtain his visa. It would therefore appear that the 3rd Respondent himself was aware of the purpose for which this letter had been granted. Whatever was the motive behind this letter, this Court finds that the 3rd Respondent was the beneficiary of this letter that facilitated his passage to the US. It is not unusual to assume that if not for this letter, the 3rd Respondent would have been hard put to secure his employment in the US. Had it been a straight application to the US company from among all qualified applicants, the 3rd Respondent would have had to wait in the queue in order to secure his employment by following proper visa procedures. The letter which titles itself "transfer" has been used to facilitate his easy access to the job in the US and in our view this document cannot be interpreted to mean a continuous employment of the 3rd respondent in the Petitioner company. Neither do the terms of P2 give rise to a continuous employment of the 3rd Respondent with the Petitioner company.

A contractual document may use the word 'transfer', but it is *the attendant circumstances and subsequent events* that would clarify the position whether there was in fact a transfer of the 3rd Respondent to another subsidiary in the US. It has to be borne in mind that the words used in a document are not always determinative of the intention of the parties.

Subsequent events after the 3rd Respondent reached the US

Subsequent acts of the 3rd Respondent upon arrival in the US throw much light on whether he was in fact transferred, or whether he actually commenced a new contract of employment with a separate legal personality – the US subsidiary company. In my view, the subsequent act of the 3rd Respondent contradicts his

version of a transfer. It is in evidence before the Commissioner of Labour and this Court that on 31/01/2013, just after the 3rd Respondent had reached the US, he entered into a new contract of employment with *Piramal Glass USA Inc.* and began to work for that subsidiary. The document marked P3 and dated January 31, 2013 unambiguously constitutes a new contract of employment because the offer of *Piramal Glass USA Inc.* on certain specified terms has been accepted by him on the same day. It needs no emphasis that an offer and its acceptance would constitute a legally enforceable agreement on the terms agreed upon between the parties-See *Ewan McKendrick, Contract Law* (13th edn, 2019). Some of the terms in the contract of employment dated January 31, 2013 (P3) signify that it is a new contract of employment and go quite contrary to any notion of a transfer from Sri Lanka.

If the version of transfer proffered by the 3rd Respondent had been true, he would not have signed this new contract of employment on January 31, 2013. The new contract shows quite clearly that the services that were to be performed were meant for the benefit of the US subsidiary and not for the Sri Lankan Petitioner company. The clauses in P3 do not say that services performed in the US is as if he performs them for the benefit of the Sri Lankan subsidiary-see *Harold Holdsworth & Co. (Wakefield), Ltd. v. Caddies* HOUSE OF LORDS [1955] 1 All ER 725:[1955] 1 WLR 352.

When one looks at items 4.3 and 4.4 of the new contract of employment marked P3, the 3rd Respondent was drawn into a statutory scheme applicable in the US and the appliable US law cannot certainly form the governing law of any purported contract of employment for a company in Sri Lanka. In such circumstances, this Court is irresistibly drawn to the conclusion that when the 3rd Respondent entered into a new contract of employment with the US company on 31/01/2013, he had long discharged himself from the services of the Sri Lankan subsidiary and commenced

his new employment with his new employer - *Piramal Glass USA Inc* as from 31.01.2013. The idea of a "transfer" which is in substance a cessation of employment with the Sri Lankan company exists only in form and it is axiomatic that form cannot triumph over substance.

In substance there was a discharge of the contractual employment between the Petitioner company and the 3rd Respondent as far back as 20th December 2012 when the Petitioner Company issued P2 and all liabilities of the Petitioner Company for gratuity should be treated as calculable as at this date of acceptance of this letter by the 3rd respondent.

As I said, any notion of transfer is nullified by the new contract of employment that was subsequently entered into in the US on 31.01.2013.

Thus it is quite clear that the US contract of employment cannot coexist with another contract of employment in Sri Lanka.

Since the commencement of the new contract of employment in the US on 31.01.2013 by way of (P3), the US subsidiary has undertaken rights and liabilities towards the 3rd Petitioner and P3 contains those rights and liabilities inclusive of retirement benefits. So for the service rendered in the US, it is the US subsidiary which has contracted to pay the 3rd Respondent and the debt of the 3rd US subsidiary cannot become the debt of the Sri Lankan company. It is the essence of separate legal personality. The debt of a company cannot be the debt of another, unless the corporate veil is lifted in the narrow circumstances as the common law dictates. The 3rd Respondent cannot thus attempt to recover gratuity from the Petitioner, when it does not owe him anything for the period of his service in the US.

So even on contractual interpretation, facts in the case do not lend themselves to a lifting of the corporate veil and the legal effect of P2 and P3 have been completely

disregarded by the primary decision maker-the Commissioner of Labour. The façade exception to separate legal personality as set down by *Adams* does not exist at all in the case and the only other exception that merits consideration is whether the US subsidiary is an agent of the Sri Lankan company. No documents ever suggest or indicate such a position.

The US subsidiary can hardly be described as an agent of the parent company in India or the other subsidiary in Sri Lanka. In *Adams* itself the English Court of Appeal rejected the agency principle. It all then boils down to the basic position that the 3rd Respondent did not go to work for an agent company of the Sri Lankan subsidiary when he assumed duties at the US subsidiary on 31/01/2013.

Thus, I hold that the US subsidiary for which the 3rd Respondent worked between 31/01/2013 and 20/12/2016 stands apart as a separate and distinct legal entity and so does the Sri Lankan subsidiary exist as a separate and distinct legal entity. In such circumstances, it is axiomatic that the work of the 3rd Respondent at the US entity cannot be approximated as equivalent to or having been performed for the Sri Lankan subsidiary.

Some further events that took place fortify my position that the 3rd Respondent had a new employment under a new employer in the US. In an email written from the US to Mr. Sanjay Tiwari, CEO and Executive Director of the Sri Lankan Petitioner Company on 27/12/2014, the 3rd Respondent makes a few queries of the CEO. Some of the questions are as follows: "*I need your big help to take me a good decision. Hope you will give me a genuine answer. No matter what the answer is? Do you offer me the job in PGC in Sri Lanka? What is the position? However, it is very critical for me to plan my future.*"

This email leaves this court in no doubt that right in the middle of his employment in the US, the 3rd Respondent was looking for a job in the Sri Lankan subsidiary.

This shows that a person in a continuous employment with the Sri Lankan subsidiary would not logically ask for a job, unless he was seeking a new employment with the Sri Lankan company. He cannot be in a state of uncertainty as to the continuity of his employment in Sri Lanka.

The fact that the 3rd Respondent had a new job with a new employer in the US is also substantiated by a letter marked as R4, written by one Scott R. Winder dated January 31st, 2017, wherein the said Winder states that Mr. B. K. Wimalasiri (the 3rd Respondent), Head of Manufacturing Excellence has received his honourable discharge and has therefore left employment with PGC-USA, Park Hills, as of December 20, 2016. The use of the words 'discharge' and 'employment' have their signification in the conveyance of their meanings that the US subsidiary had released him from his employment and brought an end to the contract of the employment by such discharge.

Ewan McKendrick in his *Contract Law* states that contracts may be discharged or brought to an end in four principal ways. They are discharge by performance, agreement, operation of law and by breach. It would appear when Scott R. Winder speaks of an honourable discharge, it would mean either a discharge by performance or a discharge by agreement. The US employment could not have been discharged unless there existed a new contract of employment between *Piramal Glass USA Inc.* and the 3rd Respondent and during the period 31.01.2013 and 201.12.2016.

Notwithstanding the above legal position, all these items of evidence have been overlooked by the Commissioner of Labour when he concluded in P13 that the Sri Lankan subsidiary is liable to pay gratuity for the services rendered in the US. The impugned decision P13 singularly concentrates only on the letter marked P2 which refers to transfer and Commissioner of Labour failed to take into account the

relevant consideration of the contract of employment evidenced by P3. The fact that the so-called transfer evident in P2, has been nullified by the new contract of employment as evidenced by P3, has not been borne in mind and discussed at all by the Commissioner of Labour. I recall the words of Goff L.J in Bank of *Tokyo v Karoon* (1987) AC 45:

> *"...The corporate structure as a legal entity should be seen as disparate and separate from the economic entity..... We are concerned not with economics but with law..."*

It is also remarkable that by the invocation of a common law power the courts can nonetheless disregard a registered company's separate legal personality-see *Roseendale BC v Hurstwood Properties (A) Ltd,* (2019) EWCA Civ 364, CA.

But such exceptional situations that give rise to lifting the corporate veil do not exist at all in this case which involves the two subsidiaries.

There was a bounden duty on the part of the Commissioner of Labour to have considered the import of the letter written by Scott R. Winder (R4) where he affirmatively speaks of an honourable discharge. It is quite clear that though Section 20 of Payment of Gratuity Act No. 12 of 1983 defines an employer to mean 'any person who employs or on whose behalf any other person employs any workmen...', the US subsidiary cannot be said to have employed the 3rd Respondent on behalf of the Sri Lankan subsidiary. I have already held having regard to *Adams v Cape Industries Ltd.* that there is no agency relationship between the two subsidiary companies unless the corporate veil is lifted on the restricted grounds known to law and agency established. No such agency is discernible or found. No contractual interpretation lends itself to a continuous employment of the 3rd Respondent with the Sri Lankan subsidiary. In the circumstances, the 3rd Respondent worked for a

different employer in the US and no gratuity can be ordered to be paid by the Sri Lankan subsidiary for the services rendered in the US.

Thus, I find the Commissioner of Labour has misunderstood the law and falls foul of the ground of illegality that renders his decision susceptible to judicial review. His failure to take into account the import of P3 and R4 renders his decision *ultra vires*- See *Bromley LBC v Greater London Council* (1983) 1 AC 768. The order P13 teams with material errors of fact which, according to emerging doctrine of material fact make them material errors of law. In administrative law, it is acknowledged that all errors of law are *ultra vires* in that the primary decision maker has exceeded his rightful jurisdiction-See -*Anisminic v Foreign Compensation Commission* (1969) 2 AC 147.

In the circumstances I hold that the impugned decision P13 made by the Commissioner General of Labour dated 15/08/2018 has to be quashed by *certiorari* and it follows that P14 dated 29/10/2018 identically casting liability on the Petitioner company should also be quashed. Accordingly, we allow this application granting the relief as prayed for in the petition.

PRESIDENT OF THE COURT OF APPEAL

Sobhitha Rajakaruna, J

I agree.

JUDGE OF THE COURT OF APPEAL