

KANNANGARA
v
MINISTER OF LABOUR AND OTHERS

COURT OF APPEAL.
MARSOOF, J. PC (P/CA) AND
SRI SKANDARAJA H. J.
CA 1648/2003
AUGUST 04 AND 19, 2003.

Writ of certiorari-Dispute relating to non promotion – Arbitration – Industrial Disputes Act – Section 4 (1) – Delay in challenging the award? – Ceased to be employed. – Not a live issue? – Does writ lie?

The petitioner who was an employee of the 4th respondent Bank sought a writ of certiorari to quash a part of the award relating to the determination that the non promotion of the petitioner to a particular post was justified. In the award the arbitrator had held that the termination of the services of the petitioner was unjustified, but held that the non promotion was justified. The compensation granted by the arbitrator was accepted by the petitioner.

The 4th respondent Bank contended that, as the petitioner has ceased to be an employee the question of his non promotion is not a live issue, and there is delay.

Held:

- (1) At the time of making this application the petitioner had left the services of the 4th respondent and had accepted the award of compensation in lieu of re-instatement, this shows that the petitioner has abandoned the right to claim re-instatement in the respondent Bank. Hence the question of non promotion has become academic.

- (2) The significance of delay is closely linked to the effect which the result of the Court intervening in proceedings for judicial review can have on third parties and the public administration. If the service criteria of the Bank is revised or intervened by Court, prejudice might be caused not only to the Bank but also to the several personnel who have been promoted on the strength of that criteria, and it will substantially affect the right of several persons. In the circumstances, the delay of 6 months - is fatal - although a six month delay is not by itself a ground for refusing relief, the circumstances of this case did not warrant excusing the delay.

APPLICATION for a writ of certiorari/mandamus.

Cases referred to:

1. *Ramasamy v State Mortgage Bank* – 78 NLR 510 at 514.
2. *G. F. R. Samidon v Sirisena Cooray and others* – CA 818/91 - C.A.M 1.7.92
3. *Singer (Sri Lanka) Ltd. v Basheed and another* – 1994. 1 Sri LR 258
4. *Sarath Hulangamuwa v Siriwardene, Principal, Visaka Vidyalaya, Colombo 5 and others* – 1986 1 Sri LR 275.

S. L. Gunasekera with Indra Ladduwahetty for petitioner.

Sanjeewa Jayawardane with Priyanthi Gooneratne for 4th respondent.

Uresha de Silva, State Counsel for 1st and 2nd respondents.

Cur. adv. vult.

September 6th, 2004.

SRISKANDARAJAH, J.

The petitioner who was the employee of the 4th respondent is seeking a mandate in the nature of a writ of certiorari to quash a part of the award of the 3rd respondent dated 11.2.2003 relating to the determination that the non promotion of the petitioner to the post of Senior Manager was justified. He is also seeking a mandate in the nature of a writ of mandamus directing the 3rd respondent to make an award in favour of the petitioner in respect of the dispute relating to the non promotion of the petitioner to the post of Senior Manager. The 1st and 2nd respondents are the Minister of Labour and the Commissioner of Labour respectively and the 3rd respondent is an arbitrator who was appointed by the Minister under section 4 (1) of the Industrial Disputes Act to settle a dispute

between the petitioner and the 4th respondent. The 4th respondent is the Sampath Bank Limited the employer of the petitioner.

The predecessor to the 1st respondent on 7.12.1993 referred a dispute between the petitioner and the 4th respondent to arbitration. The terms of reference contained two disputes. Firstly "whether the non employment of Mr. P.S.W. Kannagara, Manager, Finance and Services, by Sampath Bank Limited, after he sought the intervention of the Commissioner of Labour regarding his non promotion to the grade of Senior Manager of Sampath Bank Limited is justified and to what relief he is entitled." Secondly "Whether the non promotion of Mr. P. S. W. Kannagara, Manager, Finance and Services, Sampath Bank Limited is justified and to what relief he is entitled." After leading evidence, documents and written submissions were filed before the arbitrator by both parties and the arbitrator delivered his award on 11.2.2003. The arbitrator in relation to the first dispute held that the termination of the petitioner's services was unjustified and awarded the petitioner relief in a sum of Rs. 2,916,000 as compensation in lieu of reinstatement. In relation to the second dispute the Arbitrator held that the non promotion of the petitioner was justified and did not grant any relief to the petitioner. The petitioner accepted the payment of a sum of Rs. 2,478,600 (excluding tax) from the 4th respondent as compensation in lieu of reinstatement awarded by the 3rd respondent.

The petitioner filed this application on 25th September 2003 seeking *writs of certiorari and mandamus*. The 4th respondent raised several preliminary objections and submitted that this court should uphold the preliminary objection and dismiss the petitioner's application. The preliminary objections are substantial laches, non compliance with Rule 04 of the Court of Appeal Rules; the gazette notification of the award not being annexed to the petition, the question of non promotion of the petitioner not being a live issue, the relief prayed for being misconceived, futility and acquiescence.

One of the preliminary objections raised by the 4th respondent is that the relief sought by the petitioner to quash a part of the award to the effect that the non promotion of the petitioner to the post of the Senior Manager was justified, should not be granted as the petitioner has ceased to be an employee of the 4th respondent

and the question of his non promotion is not a live issue.

The submission of the petitioner is that the issues of non promotion continues to be a live issue in that the petitioner has got to go through life with the stigma of an award of the arbitrator, which he contends is erroneous on the face of the record, holding that he was not a fit and proper person to be promoted.

At the time of making this application the petitioner had left the services of the 4th respondent and had accepted the award of compensation in lieu of reinstatement. This shows that the petitioner has abandoned the right to claim reinstatement in the respondent bank. Hence the question of non promotion has become academic.

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Relief in relation to academic questions are dealt with in Judicial Review of Administrative Action by de-Smith. Woolf & Jowel, 5th Edition, page 746, wherein it is stated;

"The Court regard their primary role as being to resolve existing disputes between parties where their decisions will have immediate and practical consequences for at least one of the parties. Courts at the present time are struggling to cope with their existing caseload and judges naturally take exception as having to do so only arises where the litigants are seeking a declaration. There is usually no question of any other remedy being granted in what will be described here as a theoretical situation, which will be treated as including a hypothetical situation, both words being regarded as synonymous."

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The dispute in this instant case has ceased to be of practical significance and there is no public interest in this issue as well. The text referred to above illustrates that there is no question of granting any other remedy other than a declaration in an issue of a theoretical nature. This remains the situation even if one of the parties has the perfectly legitimate reason for seeking clarification of the legal situation.

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Besides the above compelling reason against the grant of writ of *certiorari* and *mandamus* the petitioner has invoked the jurisdiction of this court after a lapse of six months which could be considered as substantial laches in certain circumstances.

The petitioner submitted that the period of six months which elapsed between the date on which the petitioners received the award and made the application does not, particularly in the context of this application, constitute a delay inasmuch as the award itself was made 9 years and 2 months after the date of reference to arbitration on 7th December 1993 during which period there were, as the brief would indicate extremely voluminous proceedings in which numerous documents were produced. Thus, the petitioner has submitted that he has not been guilty of undue delay or laches, by taking six months from the date on which he received the order to file his application challenging a decision made 9 years and 2 months after the commencement of proceedings by the referrals to arbitration. 90

The petitioner has further submitted that it is now settled law that mere delay would not bar an application for a prerogative writ, and that delay would deprive the petitioner of a remedy by way of such a writ only if such delay could be construed as amounting to a waiver of his rights or if the adverse party was prejudiced and taken by surprise by reason of such delay. In support of this contention the petitioner cited *Ramasamy v Ceylon State Mortgage Bank*⁽¹⁾ at 514. 100

In *G.F.R. Samidon v Sirisena Cooray and Others* ⁽²⁾ the court held that an application for writ should be filed within a reasonable time. What constitutes reasonable and what constitutes undue delay will depend on the facts of each case. The significance of delay is closely linked to the effect which the result of the court intervening in proceedings for judicial review can have on third parties and the public administration. 110

In this application the court is requested to consider a decision made by the arbitrator on the issue of non promotion. This issue is strictly related to service criteria derived by the bank for granting of promotions. This criterion is contained in the document issued on 16.3.1993 by the 4th respondent and has been applied by the bank in respect of all personnel whose promotions were effected to the post of Senior Manager. If this service criterion is revised or intervened by this court, prejudice might be caused not only to the bank but also to the several personnel who have been promoted on the strength of that criteria and it will substantially affect the right 120

of several persons. In these circumstances the delay of over six months could be considered as an undue delay in the absence of an explanation by the petitioner.

In *Singer (Sri Lanka) Ltd v Basheed & Another* ⁽³⁾ the court held, there was ample opportunity for the respondent to have lodged an appeal from the first order of dismissal of the labour tribunal as he had notice of the order a few days after it was made. Instead of doing so he had, six months later, invoked the extraordinary jurisdiction of the Court of Appeal. Although a six month delay is not by itself a ground for refusing relief, the circumstances of this case did not warrant excusing the delay. 130

The court in granting prerogative writs have refused relief if the delay frustrates the remedy. *Sarath Hulangamuwa v Siriwardana, Principal, Visakà Vidyalaya, Colombo. 5 and Others* ⁽⁴⁾ is a case where an application for a writ of certiorari was sought to quash an order of refusal to admit a child to school. The court delivering its judgment held that certiorari being a discretionary remedy will not be granted where there was such delay in seeking the remedy as it would frustrate the remedy even if it could be granted as the class had reached the third term and the child herself was now overage. 140

Considering the facts and circumstances of this application the court upholds the preliminary objections that the issue is not a live issue and there is substantial delay in filing this application. In these circumstances the petitioner is not entitled to seek the discretionary remedy of this court and therefore the court dismisses the application of the petitioner without cost. 150

MARSOOF PC. J (P/CA) – I agree.

Preliminary objections upheld.

Application dismissed.