DAHANAYAKE AND OTHERS
vs
SRI LANKA INSURANCE CORPORATION LTD. AND OTHERS

COURT OF APPEAL,
SALEEM MARSOOF, P. C., J. (P/CA) AND SRIKANDARAJAH, J.
C. A. NO. 419/2003
JUNE 28, 2004

Writ of mandamus/certiorari - Claim of arrears of cost of living allowance - Laches - Uberrima fides - Earlier arbitral award - Suppression- Misrepresentation of material facts - Exercise of discretion of Court - Nam leges vigilantibus, non dormientibus, subveniunt

The petitioners - all former employees of the 1st respondent-sought a writ of mandamus to compel the 1st respondent to pay to the petitoners arrears of the variable cost of living allowance paid to the employees of the 1st respondent in

November, 1994. The petitioners contended that, the 1st respondent paid arrears for the period January, 1988 - November 1994, to all employees in service in November 1994, but such arrears were not paid to the petitioners who had by that time ceased to be employed by the 1st respondent.

The 1st respondent contended that there is delay/laches and that the petitioners have suppressed/misrepresented material facts.

Held :

(i) The grievance of the petitioners arose in November 1994, when the arrears of the enhanced cost of living allowance was paid to the employees in service at that time. The petitioners should have sought a writ of mandaums in 1994 and not in 2003. It is settled law that inordinate delay in invoking the jurisdiction of the Court does not entitle the petitioners to any relief under writ jurisdiction.

(ii) The petitioners have not produced a copy of the arbitral award which was made in respect of the identical claim as that which is presently before court, more so, as that 2nd respondent Commissioner General of Labour has cited and relied upon the said award in his order. It is established that the petitoners have previously unsuccessfully canvassed the identical issue arising in this case in another forum.

(iii) If there is no full and truthful disclosure of all material facts, the Court would not go into the merits of the application but will dismiss it without further examination.

APPLICATION for writs in the nature of certiorari and mandamus

Cases referred to :

1. *President, Malagoda Co-operative Society* vs. *Arbitrator of Co-operative Society* - 51 LR 167.
2. *Biso Menika* vs *Cyril de Alwis* - 1982 1 Sri LR 368
3. *Shums* vs *Peoples Bank* (1985) 1 Sri LR 197
4. *Hulangamuwa* vs *Siriwardena, Principal, Visaka Vidyalaya and others* - (1986) 1 Sri LR 275

5. *Issadeen* vs *Commissioner of National Housing and others* (2003) - 2 Sri LR 10
6. *Seneviratne* vs *Tissa Dias Bandararanayake and another* (1992) - 2 Sri LR 341 at 351
7. *W. S. Alphonso Appuhamy* vs *L. Hettiarachchi* - 77 NLR 131 at 135-136
8. *K* vs *The General Commissioner for the purpose of Income Tax Acts for the District of Kensington - Ex parte Princess Edmorbd de Poignal* - (1917) KG Div. 486
9. *Blanca Diamonds (Pvt) Ltd.*, vs *Wilfred Van Else and others* (1997) 1 Sri LR 360 at 362

Quare :

Whether a converted company which is not subject to government control is amenable to the writ jurisdiction which was amenable to the writ prior to its conversion

Chandra Gamage with *F. Ekanayake* for petitioners

Manori Jinadasha with *L. P Ariyaratne* for 1st respondent

M. N. Idroos State Counsel, for 2nd respondent

Cur. adv. vult.

November 24, 2004

SALEEM MARSOOF, J./P/CA

This applicatoin has been filed by 40 former employees (or spouses of deceased employees) of the 1st Respondent Sri Lanka Insurance Corporation Ltd, which was a public corporatoin prior to its conversion as a public limited liability company under the provisons of the Conversion of Public Corporations or Government owned Business undertaking into Public Companies Act, No. 23 of 1987. Upon the conversion which took effect on or about 3rd February 2003, all shares in the company were held by the Secretary to the Treasury, However, it appears that on or about 11th April, 2003, approximately 75% of the shares were transfered to Milford Holdings (Pvt) Ltd, and nearly 15% of the shares were transferred to Greenfield Pacific EM Holdings Ltd as part of the privatisation program of the government, and only about 10% of the shares now remain in the hands of the Secretary to the Treasury.

In this case the Petitioners seek a writ of *mandamus* to compel the 1st Respondent to pay to the Petitoners certain arrears of the variable cost of living allowance paid to the employees of the 1st Respondent in November 1994. According to the Petitioners, the 1st Respondent had paid its employees Rs. 600 per month as cost of living allowance from January, 1988, which was increased to Rs. 1,818 per month in 1994 with retrospective effect. The Petitioners claim that the 1st Respondent paid arrears of the enhanced allowance for the period January, 1998 to November 1994 to all employees in service in the 1st Respondent Corporation in November 1994, but such arrears were not paid to the Petitioners (or their deceased spouses) who had by that time ceased to be employed by the 1st Respondent. The Petitioner's position is that they are also entitled to payment of arrears as their contracts of employment subsisted during the period for which the arrears were paid. The Petitioners therefore seek by prayer (C) to the petition, an order in the nature of mandamus on the 1st Respondent to make payment of arrears of cost of living allowance with interest to the Petitioners as set out in P1. This is the one and only relief sought by the Petitioners against the 1st Respondent, The relief prayed for against the 2nd Respondent Commissioner of Labour in this case is for a writ of certiorari quashing his decision contained in his letter dated 20th January, 2003 (P11) that the petitioners are not entitled to the said arrears of the cost of living allowance.

The application of the Petitioners is resisted by the 1st Respondent *inter alia* on the ground that arrears of the enhanced cost of living allowances was paid by the 1st Respondent in November 1994 to the employees who were in service at that time in contravention of the decision of the Cabinet of Ministers dated 3rd August, 1994 (R4) which only authorised the payment of the increased rate with effect from 1st July, 1994 on the basis that no arrears will be paid. The 1st Respondent also claims that arrears were paid to employees then in service computed on the higher rate from January 1988 in violation of specific instructions issued by the Secretary to the Treasury to the 1st Respondent in the letters dated 31st October 1994 (R8) and 27th December 1994 (R9)

This case gives rise to the question whether a prerogative remedy such as mandamus is available against a converted public company which was amenable to the writ prior to its conversion and indeed all its shares were held by the Secretary to the Treasury at the time the application was filed, if in the meantime the majority shares have changed hands to make it a

predominantly privately owned company not falling within the control of the government. At the hearing of this application the learned Counsel for 1st Respondent also took up several preliminary objections, namely-

(a) that the petition filed by the Petitioners is not in conformity with the mandatory provisions of Rule 3 (1) of the Court of Appeal (Appellate Procedure) Rules of 1990 and should be dismissed forthwith ;

(b) that there is delay and/or laches on the part of the Petitioners in invoking the jurisdiction of this Court and that the Petitioners are not therefore entitled to any relief ;

(c) that the Petitioners are not entitled to seek a writ of mandamus, in this case, against the 1st Respondent, especially as the payment of arrears of the Variable Cost of Living Allowance to the Petitioners is neither a statutory nor a non-statutory duty of the 1st Respondent ;

(d) that the principles of estoppel and / or waiver and / or acquiescence and / or res *judicata* will operate against the application of the Petitioners ;

(e) that the Petitioners have suppressed and / or misrepresented material facts and / or misled Court which disentitles the Petitioners to any relief, in that-

(i) The Petitioners have failed and / or neglected to annex to the petition, the award of the learned Arbitrator in Case No. A/2587 dated 28.01.1998 against the 1st, 2nd, 3rd, 8th, 11th and 35th Petitioners wherein, the issue of whether or not the said Petitioners were entitled to arrears of the Cost of Living Allowances was meticulously considered and determined ;

(ii) The Petitioners have misrepresented to Court that the 1st Respondent followed the practice of paying a cost of living allowance of Rs. 600 as a monthly allowance to the employees of the State Sector, with effect from 1st June 1993 ; and

(iii) The Petitioners have misrepresented to Court that the 1st Respondent increased the cost of living allowance to

Rs. 1,818 with retrospective effect, whereas the payment of cost of living allowance was made with effect from 1st July 1994 and the said payment was not to be effected retrospectively as specifically stated in the decision of the Cabinet of Ministers dated 2nd August 1994 marked as R5 and reflected in the Board paper No. 108/94 of the 1st Respondent company marked as R5 (a)

It is necessary to observe at the outset that the arrears of the enhanced cost of living allowance claimed by the Petitioners relate to the period January, 1988 to November 1994, and the alleged grievance of the Petitioners arose in November 1994, when the then employees of the 1st Respondent were paid arrears of the allowance at the higher rate for that period. However, none of the Petitioners invoked the jurisdiction of this Court until this application was filed in February, 2003, nine years after the arrears were paid to the then employees of the 1st Respondent, It is also noteworthy that in or about 1995 pursuant to a complaint made by the 1st, 2nd, 3rd, 8th, 11th and 35th Petitioners to the 2nd Respondent Commissioner of Labour with a view of recovering the arrears of the enhanced cost of living allowance for the period January, 1988 to November 1994, the matter was referred for arbitration by the Minister of Labour and Vocational Training under Section 4 (1) of the Industrial Disputes Act, No. 43 of 1950, as subsequently amended. By the award dated 28th January, 1998 (R10) the learned Arbitrator held that the Petitioners are not entitled to this enhaned payment as it had been made unlawfully in contravention of a Cabinet Decision and specific directions issued by the Secretary to the Treasury. The 1st, 2nd, 3rd, 8th, 11th and 35th Petitioners have not sought to challenge the said award of the Arbitrator marked as R10, which is still valid and in force.

It has been submittted by the Counsel for the 1st Respondent that the Petitioners could have invoked the jurisdiction of this Court to redress their grievance in 1994 by way of an application for a writ of mandamus, or in 1998 by way of an application for a writ of certiorari to quash the said arbitral award marked R10. He submits that the Petitioners have slept over their rights and are before this Court nine years later seeking a payment that was made to employees of the 1st Respondent in November, 1994, He states that the Petitioners are guilty of laches or delay in seeking a writ of mandamus and a writ of certiorari from this Court at this stage. The learned Counsel for the 1st Respondent has further submitted that as the

Petitioners were well aware that they have slept over their rights, they once again made a complaint to the 2nd Respondent Commissioner of Labour on 26th January, 2002 on the identical issues, which complaint was quite correctly dismissed by the Commissioner who considered *inter alia* that there was an arbitration award already made on 28th January, 1998 in respect of the same issues. Having thus re-agitated their unsuccessful claim, the Petitoners are now before Court claiming that they have not delayed in coming to Court, by citing the decision of the 2nd Respondent made on 20th January 2003 (P11), in which he has dismissed the complaint mainly on the ground that an award dated 28th January 1998 (R10) already exists, in respect of the same matter. The learned Counsel for the 1st Respondent has contended that the complaint to the Labour Department in 2001 and the present application made to this Court, are both belated applications made well over several years after this enhanced payment was made to the employees in service in November 1994. He has stressed that the attempt to resurrect the claim by again complaining to the 2nd Respondent is indeed unbecoming conduct on the part of the Petitioners, and further contends that the Petitioners by this exercise have attempted to deceive and / or mislead Court, which conduct should no be tolerated or condoned. It is clear that after having slept over their rights for over nine years, the Petitioners re-agitated a stale claim before the Labour Department in order to find a gateway to the writ jurisdiction of this Court.

It is also to be noted that no plausible explanation has been given by the Petitioners for their delay in invoking the jurisdiction of this Court. In fact, the Petitioners did not give any direct explanation for their delay and / or admit the fact that there was delay. However, without categorically admitting the delay, they attempted to mitigate their delay by stating that they made a complaint to the 2nd Respondent Commissioner of Labour upon becoming aware that the former Chairman of the 1st Respondent, S. G. Udalamatte had secured payment of arrears on the higher rate through the intervention of Court. Reference was made to the decision of this Court in CA Application No. 318/99 (P5) filed by the said Udalamatte in 1999 against *inter alia* the 1st and 2nd Respondents to recover a sum of Rs. 92,252.20 awarded in terms of a determination made on 26th April 1995 and by the 2nd Respondent Commissioner of Labour under the Shop and Office Employees Act, No. 19 of 1954. The main objection taken by the 1st Respondent was that the application was time barred in terms of Section 50B(c) of the said Act as more than four years had elapsed after

the sum had become due. U. de Z. Gunawardana J, in a strongly worded judgment faulted the 2nd Respondent Commissioner of Labour for neglecting his duties ordained by law, and went on to overrule the objection taken by the 1st Respondent and granted relief to the Petitioner Udalamatte. The Supreme Court in SC Spl L. A. No. 125/2001 (P6) refused special leave to appeal against the judgement of this Court. As Udalamatte was armed with an order made by 2nd Respondent in his favour, the only issue in this case was whether the enforcement of the said order was time barred. Neither this Court nor the Supreme Court were called upon to consider the merits of the claim made by Udalamatte for the payment of the arrears of the enhanced variable cost of living allowance from 1988. The position of the Petitioners in the instant case is significantly different from that of Udalamatte as they are not armed with any determination in their favour made by 2nd Respondent Commissioner of Labour under the Shop and Office Employees Act.

The learned Counsel for the 1st Respondent submits that the Petitioners who had slept over their rights for nearly nine years, cannot be permitted to seek a writ to compel the performance of a purported statutory duty by citing a case filed by another party in which that party had secured relief which is personal to that party. He states that the right the Petitioners seek to enforce must be statute based and not based on the case of another individual, who has secured relief on grounds personal to him. This is not an application for fundamental rights, where principles of equality come into play and a party can claim that they are also entitled to a particular relief as it was granted to another person who is similarly placed. This application has been filed with a view of invoking the writ jurisdiction of this Court to compel the performance of a purported public duty, based on a statute. In such as case, the Petitioners cannot be allowed to come to Court after a nine year long slumber on the strength of the decision made by Court at the instance of another individual who had not slept over his rights and had successfully prosecuted his claim. The grievance of the Petitioners arose in November 1994, when the arrears of the enhanced cost of living allowance was paid by the 1st Respondent to the employees in service at that time. Therefore, the petitioners should have sought a writ of mandamus in 1994 not in 2003. It is a well recognized principle of law that a party must come to Court within a reasonable time.

In my view, Udalamatte's case cannot be compared to the case of the Petitioners, as the basis on which Udalamatte has sought relief is distinctly

different from the case of the Petitioners. As such, the Petitioners cannot rely on Udalamatte's case to secure relief for themselves. Furthermore, the fact that Udalamatte was granted this payment through the intervention of Court, was a fact within the knowledge of the Petitioners even as far back as 1998, as evident by a perusal of the Arbitral Award marked as R 10. Udalamatte's case was considered in the said Arbitral Award made in respect of the identical claim as that which is presently before this Court. In the arbitration award, the learned Arbitrator clearly distinguished the case of Udalamatte from that of the 1st, 2nd, 3rd, 8th, 11th and 35th Petitioners who were the parties to the Arbitration and dismissed the complaint of the said Petitioners. Therefore, the Petitioners (some of whom were parties to this arbitration award) cannot be heard to state that they awaited the decision in Udalamatte's case, as an excuse for the inordinate delay in seeking legal relief.

It is well settled law that inordinate delay in invoking the jurisdiction of the Court does not entitle the Petitioners to any relief under writ jurisdiction, Learned Counsel for the 1st Respondent has referred to the decisions of our courts in *President - Malagoda Co-operative Society* v. *Arbitrator of Co-operative Society*[1], *Biso Menika* v. *Cyril De Alwis*[2], *Shums* v. *People's Bank*[3], *Hulangamuwa* v. *Siriwardena*, *Principal Visaka Vidyalaya and others*[4] *and Issadeen* v *The Commissioner of National Housing and Others*[5] for the proposition that unexplained delay in making an application for a prerogative remedy disentitles a Petitioner to relief.

In *Biso Menika* v. *C. R. de Alwis, (Supra)* Sharvananda, J (as he then was) observed that-

> "A Writ of Certiorari is issued at the discretion of the Court. It cannot be held to be a writ of right or one issued as a matter of course. But exercise of this discretion by Court is governed by certain well accepted principles, The Court is bound to issue a writ at the instance of a party aggrieved by the order of an inferior tribunal except in cases where he has disentitled himself to the discretionary relief by reason of his own conduct. like submitting to jurisdiction, laches, undue delay or waiver.....The proposition that the application for Writ must be sought as soon as injury is caused is merely an application of the equitable doctrine that delay defeats equity and the longer the injurred person sleeps over his rights without any reasonable excuse the chances of his success in a Writ application

dwindle and the Court may reject a Writ application on the ground of unexplained delay.....An application for a Writ of Certiorari should be filed within a reasonable time from the date of the order ; which the applicant seeks to have quashed (pages 377 to 379 of the judgement)

It is noteworthy that in *Senerviratne* v. *Tissa Dias Bandaranayake and another*[6] Amerasinghe, J adverting to the question of long delay, commented that-

"If a person were negligent for a long and unreasonable time, the law refused afterwards to lend him any assistance to enforce his rights ; the law both to punish his neglect, nam leges vigilantibus, non dormientibus, subveniunt, and for other reasons refuses to assist those who sleep over their rights and are not vigilant"

Having said that, his Lordship went on to quote from the *Dhammapada*, *Appamada Vagga*, 26, the following passages :

"Pamadamanuyunjanti
bala dummedhinho jana
Appamadam ca medhavii
dhananam settham'va rakkati"

(Fools, men of little intelligence give themselves over to negligence but the wise man protects his diligence as a supreme treasure)

"Appamatto pamattesu
suttesu bahujagaro
Abalassm'va sighasso
hitro yati sumedhaso"

(Heedful among the heedless, watchful among the sleeping, the wise man outstrips the foolish man as a racehorse outstrips an old horse)

In *Issadeen* v. *The Commissioner of National Housing* (*Supra*) Bandaranayake J. dealing with a belated application for a writ of certiorari observed-

"It is however to be noted that delay could defeat equity. Although there is no statutory provision in this country restricting the time limits in filing an application for judicial review and the case law of this country is indicative of the inclination of the Court to be generous in finding a good and valid reason for allowing late applicaitons, I am of the view there should be proper justification given in explaining the delay in filing such belated applications. In fact, regarding the writ of certiorari, a basic characteristic of the writ is that there should not be an unjustifiable delay in applying for the remedy" (page 15 of the judgement)

These observations are very pertinent in the context of the present case in which the Petitioners have not only failed to invoke the jurisdiction of this Court within a reasonable time, but have also failed to explain their delay in a resaonable way. In all of the circumstances of this case, I hold that thePetitioners are guilty of laches and not entitled to the relief prayed for by them.

The 1st Respondent has also taken up a preliminary objection on the basis that the Petitioners have suppressed or misrepresented material facts. This by itself is a serious obstacle for the maintenance of the Petitioners' case. Our Courts have time and again emphasised the importance of full disclosure of all material facts at the time a Petitioner seeks to invoke the jurisdiction of this court, by way of writ of certiorari, mandamus or any of the other remedies referred to in Article 140 of the Constitution. In this context, the failure of the Petitioners to tender with the petition and joint affidavit filed by them a copy of the Arbitral Award dated 28th January 1998 (R10) to which the 1st, 2nd, 3rd, 8th, 11th and 35th Petitioners were parties is extremely significant. It is important to note that the impugned order of the 2nd respondent marked P11, which the Petitioners seek to have quashed by way of a writ of certiorari, specifically refers to the said Arbitral Award marked R10. In fact one of the primary considerations in the order sought to be quashed (P11) is the fact that the complaint of the Petitioners in regard to their claim for arrears at the enhanced rate, had already been considered and determined in the said award marked as R10 made in 1998. I am therefore of the view that the Petitioners were bound to produce with their application a copy of this Arbitral Award, more so as the 2nd Respondent has cited and relied upon the said Award in his order marked P11. The Petitioners have omitted annex to their petition and affidavit copy of this Award which has

comprehensively analysed the claim of the Petitioners and proceeded to reject the same.

While establishing that the 1st, 2nd, 3rd, 8th, 11th and 35th Petitioners have previously unsuccessully canvassed the identical issue presently arising in this case in another forum provided by law, the Arbitral Award marked R10 also precludes the said Petitioners from once again canvassing the same relief before the Labour Department and subsequently before this Court. Be that as it may, the said Award also reveals that Udalamatte's case has been considered and distinguished by the Arbitrator appointed under the Industrial Disputes Act. More importantly the said Award also demonstrates that Udalamatte's case was a fact within the knowledge of the Petitioners as far back as 1998. Therefore the Petitioners (some of whom were parties to the said arbitration) cannot be heard to state that they became aware of Udalamatte's case only in 2001 through the newspapers as claimed by them in the petition. The award therefore, comprehensively proves false the excuses offered by the Petitioners to justify their delay in seeking relief.

It is necessary in this context to refer to the following passage from the judgement of Pathirana J in *W. S. Alphonso Appuhamy v L. Hettiarachchi*[7]

> "The necessity of a full and fair disclosure of all the material facts to be placed before the Court when, an application for a writ or injunction, is made and the process of the Court is invoked is laid down in the case of the *King* v. *The General Commissioner for the Purpose of the Income Tax Acts for the District of Kensington-Ex-parte Princess Edmorbd de Poigna*[9]. Although this case deals with a writ of prohibition the principles enunciated are applicable to all cases of writs or injunctions. In this case a Divisional Court without dealing with the merits of the case discharged the rule on the ground that the applicant had suppressed or misrepresented the facts material to her application. The Court of Appeal affirmed the decision of the Divisional Court that there had been a suppression of material facts by the applicant in her affidavit and therefore it was justified in refusing a writ of prohibition without going into the merits of the case. In other words so rigorous is the necessity for a full and truthful disclosure of all material facts that the Court would not go

into the merits of the application, but will dismiss it without further examination".

Similary, in *Blanca Diamonds (Pvt) Ltd v Wilfred Van Else & Others*[9], Jayasuriya; J. emphasized the duty a party owes to Court for a full and frank disclosure when initiating writ proceedings in the following manner-

> "In filing the present application for discretionary relief in the Court of Appeal Registry, the petitioner company was under a duty to disclose *uberrima fides* and disclose all material facts to this Court for the purpose of this Court arriving at a correct adjudication of the issues arising upon this application. In the decision in *Alponso Appuhamy v. Hettiarachchi*[7] Justice Pathirana, in an erudite judgment, considered the landmark decisions on this province in English Law, and cited the decisions which laid down the principle that when a party is seeking discretionary relief from the Court upon an application for a writ of certiorari, he enters into a contractual obligation with the Court when he files an application in the Registry and in terms of that contractual obligation he is required to discolse *uberrima fides* and disclose all material facts fully and frankly to this Court....".

I hold that the Petitioners are in breach of this solemn covenant and are therefore not entitled to any relief.

In view of the finding of this Court the Petitioners are guilty of undue and unexplained delay in invoking the jurisdiction of this Court and are additionally guilty of violating their duty of *uberrimae fides*. It is not necessary for this Court to deal with the questioin whether a converted company which is not subject to government control is amenable to the writ jurisdiction of this Court or to rule on the other preliminary objections taken up by learned Counsel for the 1st Respondent. The application filed by the Petitioners is dismissed but without costs in all the circumstances of this case

SRISKANDARAJAH, J.—I agree

Application dismissed.