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

In the matter of an application for order in the nature of Writs of Certiorari an Mandamus, under and in terms of Article 140 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

CA-WRT-312/2023

Lanka Milk Foods (CWE) PLC,
No. 579/1
Welisara
Ragama

Petitioner

Vs.

1. B.K.Prabhath Chandrakeerthi
   Commissioner General of Labour
   Labour Secretariat
   PO Box 575
   Colombo 05.

2. H.K.R.Perera
   Assistant Commissioner of Labour
   District Labor Office
   Ja-Ela

3. T.M.I. Lakmali
   Assistant Commissioner of Labour
   District Labor Office
   Ja-Ela

4. K.L.D.V. Rathnakumari
   Assistant Commissioner of Labour
   District Labor Office
   Ja-Ela

5. T.B.G. Silva
   No. 93/4
   Kahanthota Road
   Malabe

Respondents

Before : **N. Bandula Karunarathna, P/CA, J.**
B. Sasi Mahendran, J.

Counsel: Shivan Coorey for the Petitioners
Manohara Jayasinghe, DSG with Maithri Amarasinghe, SSC for the 1st to 3rd Respondents.

Argued On: 08.11.2024

Written Submissions: On 27.11.2024 (by the Petitioner)
25.11.2024 (by the 1st-3rd Respondents)

Judgment On: 18.12.2024

JUDGMENT

B. Sasi Mahendran, J.

The Petitioner instituted this application by petition dated 08.06.2023 seeking inter alia a Writ of Certiorari quashing the decision contained in the Documents marked as P2 and P16 (d) and prohibiting Respondents from taking further steps in relation to gratuity.

The facts of this case are briefly as follows:

The Petitioner, Lanka Milk Foods (CWE) Ltd is a company engaged in the production and distribution of dairy products which is duly incorporated under the Companies Act No. 7 of 2007. The Petitioner states that the 5th Respondent joined the Petitioner Company on 1st June 2005 as a Sales Representative and worked in the same position until his termination on 28.01.2019.

The Petitioner states that, between September 2018 and January 2019, the Petitioner received various complaints about the misappropriation of Company money and/or goods and fraudulent practices engaged by the Area Sales Managers, Distribution Agents and Sales Representatives. Upon inquiries, it was revealed that the 5th Respondent also had aided and abetted such fraudulent activities.

The Petitioner further states that while the investigations were ongoing, the 5th Respondent submitted a letter on 31.12.2018 marked P8 to the Director Operations of the Company stating that K.A.P.K. Kularathne, the Acting Field Sales Manager also the Area Sales Manager of the Company committed the fraudulent acts and/or the misappropriations over a period of time and sought that the officers who have been involved in such fraudulent activities be punished.

The Petitioner avers that thereafter, investigations were initiated which revealed that the 5th Respondent has aided and abetted the fraudulent activities during the time period he was working under the said Area Manager. On these grounds, the Petitioner terminated the service of the 5th Respondent by letter dated 28.01.2019 marked as P3.

The Petitioner avers that subsequent to the investigations, it was revealed that the value of total loss incurred to the Petitioner due to the fraudulent activities of the said group of employees including the 5th Respondent amounts to Rs. 20,102,187.03.

The Petitioner further states that the value of such misappropriation as stated in the said letter marked P8 was corroborated by the letter marked P7 sent by the Owner of 'Sanduni Distributors'.

The Petitioner has lodged complaints in the Criminal Investigation Department and the Crimes Division of the Mahabage Police Station against the said group of employees including the 5th Respondent for criminal breach of trust, criminal misappropriation, fraud, and undue enrichment on 16.08.2019.

The 5th Respondent has made an application to the Labour Commissioner in terms of the Payment of Gratuity Act No. 12 of 1983 as amended (hereinafter referred to as the Gratuity Act) to determine the quantum of gratuity payable by the Petitioner. On 17.09.2019, the Petitioner received a Notice signed by the 4th Respondent requesting the Petitioner to participate in an inquiry on 02.10.2019 based on the allegation of non-payment of gratuity to which a representative of the Petitioner company participated and submitted the requested documents.

By letter dated 14.10.2019, the Petitioner informed the 1st to 4th Respondents that all the necessary documents have been tendered to them on their request, and according to the law,

the issue on forfeiture should be canvassed in the Labour Tribunal therefore, requested the Respondents to direct the 5th Respondent to file an application in the Labour Tribunal.

The Petitioner states that several correspondences were exchanged between the Petitioner and the Respondents among which the letter dated 04.03.2020 marked P16(d) sent by the 4th Respondent notified the Petitioner to deposit an amount of Rs. 281,385/- as gratuity payable to the 5th Respondent. Further, to the utter dismay of the Petitioner, by letter dated 10.11.2022 marked as P2, the 2nd Respondent conveyed its decision that the 1st to 4th Respondents have the jurisdiction to conduct the said inquiry. Further, it was held that the forfeiture of gratuity of the 5th Respondent is wrongful, therefore, the 1st to 4th Respondents would resort to legal actions against the Petitioner. Thereafter, the Res issued a Certificate dated 20.01.2023 in terms of Section 8(1) of the said Act to the Learned magistrate of Welisara. The Learned Magistrate of Welisara issued summons against the Petitioner for bearing Case No. 7536/23 requiring the Petitioner to appear before the Court for the alleged non-payment of gratuity on 09.05.2023.

The main gravamen of the Petitioner is that the decision contained in the documents marked as P2 and P16(d) is illegal and ultra vires.

In this context, the Petitioner invokes the writ jurisdiction of this Court seeking a writ of Certiorari to quash the decision contained in the documents marked as P2 and P16(d) on the basis that since the 5th Respondent was terminated for misappropriation of funds of the employer and particular gratuity was forfeited by the Petitioner.

Before going into the questions of law, this Court focuses on what basis gratuity is awarded as broadly discussed in several judicial pronouncements.

In Independent Industrial and Commercial Employees' Union (on behalf of P.T. Fernando) v. Board of Directors, Co-operative Wholesale Establishment, Colombo 74 NLR 344 at 349 His Lordship Alles J held that:

> "The word 'gratuity' is used in common parlance as a retirement benefit available for long and meritorious service rendered by the employee. A gratuity has now become a legitimate claim, which a workman can make and which may be the subject of an industrial dispute, and is intended to help a workman after his retirement, whether the retirement is due to the rules of superannuation or physical disability or otherwise. It is a benefit which an employee who has worked faithfully and loyally for his employer can look forward to in the evening of his life and which a generous and conscientious employer considers it just and equitable to offer for loyal and meritorious service."

In The National Union of Workers v. The Scottish Ceylon Tea Company Limited 78 NLR 133 at 173, His Lordship Sharvananda J (as he was then) held that:

> "Now, what is the connotation of the word 'gratuity' as used in Section 31B (1) (b) and 33(1) (e) of the Industrial Disputes Act? The primary meaning of 'gratuity' is that it is a gift of money in addition to salary or wages voluntarily made to a retiring employee for services rendered by him. This imports the conception of a gift or boon otherwise described as 'ex gratia' payment. In industrial law, this meaning has undergone a fundamental change in its attribute of voluntariness. Gratuity can no longer be regarded as an ex gratia payment or merely as a matter of boon."

Further held at page 174,

> "The granting of bonuses, gratuity, pension and the like to employees today is not out of charity. They are given in order to make the employees more contented and to enable them to have a sense of satisfaction and security without being always on the brink of insecurity about their future….. However, long and faithful or meritorious service is a condition precedent to the award of gratuity; for, gratuity still remains a reward for faithful service rendered for a fairly substantial period."

Further at page 178,

> "It is manifest that the word 'gratuity' has thus come to mean not only retiring allowance or retiral benefit payable on retirement, but also terminal benefit payable on termination of a long and faithful service consequent to resignation prior to retiring age."

Further held at page 179,

> "In my considered view, a workman becomes entitled to payment of gratuity on hi resignation or premature retirement also, provided he had rendered faithful service for a considerable period."

This dictum was referred to by His Lordship Chief Justice De Silva in De Costa v. ANZ Grindlays Bank Plc. (1996) 1 SLR 307.

The concept of gratuity therefore is a benefit granted to a workman by the employer subsequent to the cessation of his services, to support the post-retirement era of such workman as a plaudit for the faithful and meritorious service.

The concept of gratuity as a retirement benefit has been given legal recognition by the introduction of Part IVA of the Industrial Disputes Act No. 43 of 1950 by Amendment Act

No. 62 of 1957. Section 31B (1) is also included in the said Part IVA of the IDA which reads as follows:

> "31 B. (1) A workman or a trade union on behalf of a workman who is a member of that union, may make an application in writing to a labour tribunal for relief or redress in respect of any of the following matters:-
>
> (a).....
>
> (b) the question whether any gratuity or other benefits are due to him from his employer on termination of his services and the amount of such gratuity and the nature and extent of any such benefits;
>
> (c) …."

In 1983, the prime legislation relating to gratuity was introduced which is the Payment of Gratuity Act No. 12 of 1983.

According to the said Act, Sections 5(1) and 6(2) deal with who is liable to pay gratuity and how the gratuity is calculated respectively which read as follows:

> "5.(1) Every employer who employs or has employed fifteen or more workmen on any day during the period of twelve months immediately preceding the termination of the services of a workman in any industry shall, on termination (whether by the employer or workman, or on retirement or by the death of the workman, or by operation of law, or otherwise) of the services at any time after the coming into operation of this Act, of a workman who has a period of service of not less than five completed years under that employer, pay to that workman in respect of such services, and where the termination is by the death of that workman, to his heirs, a gratuity computed in

accordance with the provisions of this Part within a period of thirty days of such termination."

"6. (2) A workman referred to in subsection. (1) of section 5 shall be entitled to receive as gratuity, a sum equivalent to-

(a) half a month's, wage or salary for each year of completed service computed at the rate of wage or salary last drawn by the workman, in the case of a monthly rated workman; and

(b) in the case of any other workman, fourteen days' wage or salary for, each year of completed service computed at the rate of wage or salary last drawn by that workman:

Provided, however that, in the case of a piece rated workman the daily wage or salary shall be , computed by dividing the total wage or salary received by him for a period of three months immediately preceding the termination of his employment, by the number of days worked by him in that period."

Further, another section was introduced where the employer can forfeit the gratuity. According to Section 13 of the Gratuity Act, which reads as follows:

"Any workman, to whom a gratuity is payable under Part II of this Act and, whose services have been terminated for reasons of fraud, misappropriation of funds of the employer, willful damage to property of the employer, or causing the loss of goods, articles or property of the employer, shall forfeit such gratuity to the extent of the damage or loss caused by him."

Furthermore, Sections 31B (1) (b) and (c) of the IDA were amended through Section 17 of the Gratuity Act.

For easy reference, Sections 31B (1)(b) and (c) are reproduced below.

> "(b) the question whether any gratuity or other benefits are due to him from his employer on termination of his services and the amount of such gratuity and the nature and extent of such benefits, where such workman has been employed in any industry employing less than fifteen workmen on any date during the period of twelve months preceding the termination of the services of the workman who makes the application or in respect of whom the application is made to the tribunal;
>
> (c) the question whether the forfeiture of a gratuity in terms of the Payment of Gratuity Act, 1983 has been correctly made in terms of that Act,"

In terms of Section 13, an employer can forfeit the gratuity of a workman if his services have been terminated on the grounds of fraud or misappropriation on the part of the employee.

Our courts have considered that if the employer terminated the services of an employee on these grounds, the correction of the decisions should go before the Labour Tribunal.

This Court is mindful of the procedure laid down in the Act relating to an industrial dispute which was broadly discussed by His Lordship A.H.M.D. Nawaz J in M.A. Lanka (Pte.) Ltd. v. Commissioner General of Labour and Others C.A. (Writ) Appl. No.387/2013 decided on 21.11.2017.

> "By way of another addendum, I must refer to Section 31B(1)(b) of the Industrial Disputes Act which empowers a Labour Tribunal to award gratuity to a workman when he has worked in an industry which has employed less than 15 workmen. By

way of contrast, Section 5 of the Payment of Gratuity Act empowers the Commissioner of Labour to oversee the payment of gratuity to a workman when he has been employed by an employer who has employed 15 or more workmen. Thus the underlying metwand is that there are two regimes for payment of gratuity. An employer who employs in terms of the Act is cast upon the liability to pay only if he has employed 15 workmen or more, whereas the regime under the Industrial Disputes Act empowers the Labour Tribunal to award gratuity when there are less than 15 employees. An additional jurisdiction given to the Labour Tribunal is that if an employer who has or has had more than 15 workmen during the period of 1 year preceding the date of termination of services of a workman has terminated the services of the workman on grounds of misconduct as set out in Section 13, the Labour Tribunal is bound to assess the correctness of the decision. Given that the services of the 5th Respondent were terminated on disciplinary grounds such as fraud and misappropriation, it would appear that Section 13 of the Act read with Section 31B (1)(c) of the Industrial Disputes Act would be engaged and consequently it would be the Labour Tribunal which has to go into the correctness of the decision to forfeit gratuity. But the gravamen of the contention before this Court is that by letter dated 19.01.2012 (P3) the 5th Respondent~workman complained to the Assistant Commissioner of Labour (East). It is before this forum namely the Assistant Commissioner of Labour that the employer took up the jurisdictional objection viz~ the correctness of the forfeiture cannot be gone into by the Commissioner."

Further held that:

"In other words since Section 13 of the Payment of Gratuity Act, No.l2 of 1983 only applies to an industry where the employer has or has employed fifteen or more

workmen, it goes without saying that under Section 31B (1)(c) of the Industrial Disputes Act, the Labour Tribunal would consider the correctness of forfeiture effected in an industry which has employed fifteen or more workmen within a period of 12 months preceding the date of termination of services of a workman. It all boils down that the Payment of Gratuity Act, No. 12 of 1983 applies to an industry that has employed IS or more employees. But even in such a situation, if there is a forfeiture of gratuity on the grounds set out in Section 13 of the Act, the correctness of that decision goes before the Labour Tribunal for a legal appraisal. It is only when there is an industry having IS or more workmen but there is no allegation of fraud or misappropriation as set out in Section 13, the Commissioner gets jurisdiction to go into the question of gratuity."

A similar factual matrix was considered in Lanka Milk Foods (C.W.E) PLC v. B.A. Mahinda Assistant Commissioner of Labour, CA Writ Application No: 0392/2019 decided on 05.04.2022 where His Lordship S.U.B. Karalliyadde J held that:

"As per section 31 B of the Industrial Disputes Act, the labour tribunal has the jurisdiction to determine the question of the correctness of a decision to forfeit the payment of gratuity. In terms of section 13 of the Gratuity Act, an employer could forfeit the gratuity of an employee only where the employee's services have been terminated for the reason of fraud, misappropriation of funds of the employer, willful damage to property of the employer, or causing the loss of goods, articles or property of the employer."

Both cases indicate that if the workman was terminated on the grounds of fraud, then the workman should make an application under Section 31C to find out whether the allegation made by the employer to forfeit the gratuity is genuine or not as the Labour Tribunal has the

power under Section 31C to make such inquiries and hear all such evidence which reads as follows:

> "(1) Where an application under section 31B is made to a labour tribunal, it shall be the duty of the tribunal in to make all such inquiries into that application and hear all such evidence as the tribunal may consider necessary and thereafter make, not later than six months form the date of such application, such order as may appear to the tribunal to be just and equitable.
>
> (2) A labour tribunal conducting an inquiry shall observe the procedure prescribed under section 31A, in respect of the conduct of proceedings before the tribunal."

I am of the view that when the employer takes a defence under Section 13 not to pay the gratuity, the question will arise whether the said forfeiture of gratuity has been correctly made. Then there should be an inquiry to find out the guilt of the employee. The above said provision allows to have the inquiry and to assess the correction of the forfeiture of the gratuity which means what is the damage caused to the employer by the act of the workman. In other words, whether the employer is entitled to invoke Section 13 or has acted erroneously.

In the instant application, the Petitioner has indicated the reasons for the termination of the 5th Respondent in the letter dated 28.01.2019 marked P3. For easy reference, an excerpt of the said letter is reproduced below:

> "Whilst making inquiries with distributors into the recent debacle occurred at Lanka Milk Foods (CWE) Plc on account of fraudulent misuse of money and goods of the company and distributors, it has become evident that you too have aided and abated

for the actions of Area sales Managers and Sales Representatives, to claim fraudulent allowances and other benefits given to Distributors, inclusive of transport rebate, credits, free issues, incentives, and you have benefitted from the actions when you are not entitled to the same and of which the Company has paid and settled. Further you have fraudulently certified purchase orders, invoices, bills and statements and have caused a massive loss to the company, quantum of which is being calculated and all losses will be deducted from the payments due to you from the company. It has bee revealed that you have misled the management and have engaged in selling not only company products but of the competitors as well of which you have defaulted.

On the above it has been revealed that you are guilty of all accounts in your Letter of Appointment and therefore you are Terminated in your services with immediate effect."

In the instant case, it is clear that the 5th Respondent was terminated on the grounds of fraud and misappropriation. This Court is mindful that as set out by our Courts, gratuity is paid as a retirement benefit for the workman for faithful and meritorious service. The question thus arises is if the 5th Respondent was terminated on the grounds of fraud and misappropriation, is he still entitled to such gratuity. For the purpose of assessing and finding out the truth as to the misconduct on the part of the employee, an application should be made to the Labour Tribunal under Section 31B (1) (c).

In the circumstances, this Court proceeds to quash the documents namely P2 and P16(d)-by way of writs of Certiorari. We allow the 5th Respondent to invoke the jurisdiction of the Labour Tribunal in terms of Section 31B (1) (c)of the Industrial Disputes Act.

No order for cost.

JUDGE OF THE COURT OF APPEAL

N. Bandula Karunarathna (P/CA), J.

I AGREE

PRESIDENT OF THE COURT OF APPEAL