

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

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

**CA (Writ) Application No:  
345/2021**

MADULSIMA PLANTATIONS PLC,  
Hingurugama Complex,  
Badulla.

**PETITIONER**

**Vs.**

1. B.K. Prabath Chandrakeerthi,  
Commissioner General of Labour,  
Labour Secretariat,  
PO Box. 575,  
Colombo 05.
2. D.M. Gamini,  
Assistant Commissioner of Labour,  
District Labour Office Badulla,  
Station Road,  
Badulla.
3. B.P. Dharmasena,  
No: 8,  
Saman Mawatha,  
Gangula, Pandura.

**RESPONDENTS**

**Before: M. T. Mohammed Laffar, J.**

**S. U. B. Karalliyadde, J.**

**Counsel:**

Shivan Cooray for the Petitioner.

Shantha Jayawardena with Ms. Thilini Vidanagamage for the 3<sup>rd</sup> Respondent.

Ms. Y. Fernando, DSG for the 1<sup>st</sup> and 2<sup>nd</sup> Respondents.

**Written submissions tendered on:**

27.06.2023 by the 3<sup>rd</sup> Respondent.

02.10.2023 by the Petitioner.

14.11.2023 by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents.

**Argued on:** 18.07.2023

**Decided on:** 23.01.2024

**S.U.B. Karalliyadde, J.**

The Petitioner to this Writ Application, Madulsima Plantations PLC (the Petitioner Company) is a duly incorporated Company under the Companies Act, No. 7 of 2007. The 3<sup>rd</sup> Respondent was a permanent employee of the Petitioner Company. He joined the predecessor entity of the Petitioner Company namely, Diyagama West Estate Plantation on 01.10.1973 as a Clerk and later elevated to the Post of Financial Controller of the Petitioner Company. Even though he had to retire in 2003 upon reaching the age of 55 years, which is the optional retirement age, on the requests made by the 3<sup>rd</sup> Respondent, the Petitioner Company extended his services (as per letters marked as “P2-I” to “P2-P”) from time to time on periodic basis up to 17.09.2008, till he reached the compulsory retirement age of 60 years. By the letter dated 18.08.2008 (marked as P4), the 3<sup>rd</sup> Respondent requested the Petitioner Company to arrange and settle his terminal dues to the date of compulsory retirement, on 17.09.2008. Accordingly, the Petitioner Company, by the letter dated 25.08.2008 (marked as P5) informed the 3<sup>rd</sup> Respondent to relinquish his duties with effect from 18.09.2008 and

collect his terminal dues. In calculating the terminal dues, the Petitioner Company considered the service period of the 3<sup>rd</sup> Respondent as from 1973 to 2008 and his terminal salary is Rs. 67,165/-. The gratuity was calculated in terms of the Payment of Gratuity Act, No. 12 of 1983 (as amended) (hereinafter referred to as “the Act”). That calculation was certified as correct by the 3<sup>rd</sup> Respondent himself as the Financial Controller of the Petitioner Company (P6 and P7). On 18.09.2008, the 3<sup>rd</sup> Respondent was paid a sum of Rs. 1,112,571/36 (Rs. 1,074,640/- as the Retirement Gratuity plus Rs. 37,931/36 as the salary for the number of days he worked in September 2008). It was duly acknowledged and accepted by the 3<sup>rd</sup> Respondent admitting in writing by the statement dated 18.09.2008 (marked as P8) that he has no other claims against the Petitioner Company.

Thereafter, from 19.09.2008 to 17.09.2018 until he reached the age of 70, on his requests service extensions were granted to the 3<sup>rd</sup> Respondent periodically based on ‘Fixed Term Contracts’. The extensions that were given to the 3<sup>rd</sup> Respondents are as follows.

<b>Document</b>	<b>Commencement Date</b>	<b>Termination Date</b>	<b>Break in the service</b>
P9	19.09.2008	31.12.2008	31 Days
P10A	01.02.2009	31.12.2009	-
P10C	01.01.2010	31.12.2010	-
P10E	01.01.2011	31.12.2011	-
P10G	01.01.2012	31.12.2012	-
P10I	01.01.2013	31.12.2013	-
P10K	01.01.2014	30.06.2014	31 Days

P14	01.08.2014	31.12.2014	-
P17	01.01.2015	31.12.2015	-
P19	01.01.2016	31.12.2016	-
P21	01.01.2017	31.12.2017	-
P23	01.01.2018	01.03.2018	31 Days
P27	01.04.2018	30.06.2018	-

By the letter dated 27.06.2014, the 3<sup>rd</sup> Respondent requested the Petitioner Company for a further Fixed Term Contract of Employment, subject to a breaking of the service as appropriate (marked as P12A). On the same day, by the letter marked as P12B, he tendered the notice of retirement with effect from 01.07.2014. In response, the Petitioner Company acknowledged the notice of retirement and by the letter marked as P13 informed the 3<sup>rd</sup> Respondent to collect his terminal dues.

Further, by the letter dated 29.01.2018 (marked as P25), the 3<sup>rd</sup> Respondent informed the Petitioner Company of his intention to terminate his contract of employment with effect from 01.03.2018. In response, the Petitioner Company informed the 3<sup>rd</sup> Respondent by letter dated 01.02.2018 (marked as P26) to collect his terminal dues if any, upon the resignation.

On 11.10.2018, all the overdue payments including gratuity were paid to the 3<sup>rd</sup> Respondent (as per the Employee Resignation/Exit marked as P28), which the 3<sup>rd</sup> Respondent signed admitting that there is no claim overdue and accepted the gratuity payment of Rs. 564,367/50. Further, the Petitioner Company paid Rs. 84,655/12 as penalty charges on the gratuity on 07.11.2018 (marked as P29) which the 3<sup>rd</sup> Respondent acknowledged by placing his signature.

The Assistant Commissioner of Labour (the 2<sup>nd</sup> Respondent), by the letters dated 28.01.2019 (marked as 1R1(A)) and 13.02.2019 (marked as 1R1(B)) informed the Petitioner Company to be present for an inquiry scheduled to be held in respect of a complaint made by the Petitioner regarding the non-payment of gratuity in terms of the Act. On 20.02.2019, the 2<sup>nd</sup> Respondent decided that the Petitioner should pay the 3<sup>rd</sup> Respondent a sum of Rs. 1,120,122/50 as gratuity and a sum of Rs. 2,80,030/62 as surcharge on the gratuity in total of Rs. 1,401,153/12 for the period of 44 years on the basis that, in terms of Section 5 of the Act there is no breakage of services of the 3<sup>rd</sup> Respondent from 01.10.1973 (from the date the 3<sup>rd</sup> Respondent joined the predecessor of the Petitioner Company) up to 30.06.2018 (the date on which the last contract of employment expired) (marked as 1R2).

By the letter dated 02.03.2019 (marked as P31) of the 2<sup>nd</sup> Respondent sent to the Petitioner Company it was informed to deposit in the District Labour Office in Badulla a sum of Rs. 1,120,122/50 as gratuity and Rs. 2,80,030/62 as surcharge payable to the 3<sup>rd</sup> Respondent on the basis that the gratuity has not been properly calculated by the Petitioner Company. The Petitioner Company appealed against that decision to the Commissioner General of Labour (the 1<sup>st</sup> Respondent) by the letter dated 25.03.2019 (marked as P32), but that appeal was rejected as alleged by the Petitioner Company without the Petitioner Company being heard (P33). The Petitioner Company therefore requested the 1<sup>st</sup> Respondent to conduct a fresh inquiry awarding an opportunity to present facts on its behalf. Afterwards, the 2<sup>nd</sup> Respondent by the letter dated 11.10.2020 (marked as P35/1R3) informed the Petitioner Company to act according to the letter marked as P31 and deposit the amount stated in that letter with the District Labour Office on or before 02.11.2020. Nevertheless, the 1<sup>st</sup> Respondent by the letter dated 19.01.2021 (marked as P38) requested the Petitioner Company to participate in a

discussion to be held on 23.02.2021. Following the discussion, by the letter dated 02.03.2021 (marked as P39), the 1<sup>st</sup> Respondent directed the 2<sup>nd</sup> Respondent to recover the outstanding sum of gratuity from the Petitioner Company.

In the above outset, the Petitioner Company seeks, *inter alia*, the following reliefs.

- 1) Issue a mandate in the nature of Writ of Certiorari quashing the Order of the 2<sup>nd</sup> Respondent dated 7<sup>th</sup> March 2020 contained in P31.
- 2) Issue a mandate in the nature of Writ of Certiorari quashing the Order of the 2<sup>nd</sup> Respondent dated 11<sup>th</sup> October 2020 contained in P35.
- 3) Issue a mandate in the nature of Writ of Certiorari quashing the Order of the 2<sup>nd</sup> Respondent dated 2<sup>nd</sup> March 2021 contained in P39.

The 1<sup>st</sup> and 2<sup>nd</sup> Respondents are of the view that the 3<sup>rd</sup> Respondent had an uninterrupted service from 1973 to 2018, with several extensions and repeated awards of Fixed Term Contracts without a break of service. They admit that a *pro forma* “retirement letter” had been submitted by the 3<sup>rd</sup> Respondent however, services have not been discontinued and therefore, the Petitioner Company is liable to pay the statutory dues in terms of the Act.

Section 5(1) of the Act provides that;

*"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." (emphasis added).*

Also, as per Section 20 of the Act,

*"Completed service" means **uninterrupted service** and includes service which is interrupted by approved leave on any ground whatsoever, a strike or lockout or cessation of work not due to any fault of the workman concerned, whether such uninterrupted or interrupted service was rendered before or after the coming into operation of this Act."*

The 3<sup>rd</sup> Respondent has completed 32 years of service at the Petitioner Company until he reached the age of compulsory retirement. However, the fixed-term contracts of employment starting from P9 fail to meet this criterion of **5 years of completed service** to be eligible for the payment of gratuity for the disputed period.

The reasons given by the 1<sup>st</sup> Respondent as to why the Petitioner Company should pay a sum of Rs. 1,400,153/12 as gratuity and a surcharge on such amount, as conveyed by the three letters referred to above, namely P31, P35 and P39 can be summarised as follows:

- 1) The 3<sup>rd</sup> Respondent's contract of employment has been proceeded without interruption from 1973 to 2018.
- 2) The Petitioner Company miscalculated the payment of gratuity by not considering the last paid salary of the 3<sup>rd</sup> Respondent, therefore is liable to pay a surcharge.

Dissatisfied with the decision of the 1<sup>st</sup> and 2<sup>nd</sup> Respondents, the Petitioner Company has filed this Application seeking, *inter alia*, a Writ of Certiorari to quash the decision contained in the letters marked as P31, P35 and P39.

The Petitioner Company is disputing its liability to pay gratuity for the periods covered from P9 to P27 (i.e. from 19.09.2008 to 30.06.2018) on the basis, *inter alia*, that:

- (a) The contract of employment evidenced by P3 came to an end on 18.09.2008.
- (b) 3<sup>rd</sup> Respondent accepted that his contract of employment had been terminated by accepting the payment of gratuity (P6, P7, P8, P13) and
- (c) The contracts P9, P10A, P10C, P10E, P10G, P10I, P10K, P14, P17, P19, P21, P23 and P27 are fresh contracts, which do not attract any liability on account of gratuity, as the minimum period of employment required by Section 5 of the Act has not been satisfied.

Under the above-stated circumstances, this Court has to determine whether the decisions of the 1<sup>st</sup> and 2<sup>nd</sup> Respondents are irrational, arbitrary, illegal, against the rules of natural justice and *ultra vires* and if so, whether the said decisions are liable to be quashed by Writs of *Certiorari*. In determining that, this Court has to consider whether the contract of employment of the 3<sup>rd</sup> Respondent, as demonstrated by P4, P6, P7, and P8 came to an end on 19.09.2008, which the learned Counsel appearing for the Petitioner argues it did, and the learned Counsel appearing for the Respondents argue that there is continuity of service on the same contract of employment in terms of P9, P10A, P10C, P10E, P10G, P10I, P10K, P14, P17, P19, P21, P23 and P27, and that the contract of employment was terminated only on 30.06.2018. The learned Counsel appearing for the 3<sup>rd</sup> Respondent further argues that the 3<sup>rd</sup> Respondent was kept on



continuing with the Petitioner and had sent to the Petitioner a letter dated 18.08.2008 (marked as P4), which reads as follows,

“RETIREMENT

*Further to my letter dated 17<sup>th</sup> March 2008, I write to bring to your kind notice that I will be **retiring from regular service** with effect from 18<sup>th</sup> September 2008, on reaching sixty years of age. Accordingly, I shall be thankful if you would kindly arrange to settle my terminal dues as my regular contract of employment terminates on 18<sup>th</sup> September 2008.*

*I shall be most grateful if you could consider **a fixed term contract of employment thereafter for a period of one year.**”*

It is clear from P4 that the 3<sup>rd</sup> Respondent was keen on continuing his employment with the Petitioner Company without a break but on the basis of an extension of the existing contract of employment by way of a fixed-term contract of employment. The result of this request was the appointment of the 3<sup>rd</sup> Respondent as the ‘Financial Controller’ on the contract dated 01.09.2008, marked as P9.

This Court therefore observes the following facts:

- (a) The 3<sup>rd</sup> Respondent himself informed the Petitioner Company regarding his retirement from the regular service and requested a fixed-term contract of employment for one year by P4
- (b) The Petitioner Company has made it clear to the 3<sup>rd</sup> Respondent by P9 that what is being offered is not an extension of service but a fresh employment for the period commencing from 19.09.2008 terminating on 31.12.2008

- (c) The content of P9 demonstrates that the 3<sup>rd</sup> Respondent was very much aware of the consequences of re-engaging on a contract basis for less than 5 years and has consented to that arrangement.
- (d) It is important to note that, as the Financial Controller of the Petitioner Company, the 3<sup>rd</sup> Respondent had certified the payment of Gratuity to him, which was paid upon his retirement and collected the terminal dues by him accordingly (P6, P7 and P8).
- (e) The 3<sup>rd</sup> Respondent knew that what he was agreeing to, was not an 'extension of service'.
- (f) For the periods covered by the fixed-term contracts of employment, the 3<sup>rd</sup> Respondent is not entitled to gratuity.

It is in the above factual background that the learned Counsel for the Petitioner Company submitted that the 3<sup>rd</sup> Respondent “retired” from the employment with effect from 18.09.2008 and that the employment came to an end on 18.08.2008 as evidenced by P5.

Therefore, it is evident that the Petitioner Company has complied with the provisions of the Act and the 3<sup>rd</sup> Respondent, by accepting the payment of gratuity has acknowledged the termination of his employment due to retirement.

In *Bogawanthalawa Tea Estates PLC vs Commissioner General of Labour*,<sup>1</sup> it was held that,

*“It is therefore clear to this Court that the Petitioner, having given a contractual appointment to the 6<sup>th</sup> Respondent on 20<sup>th</sup> February 2012, had taken steps the very next date to comply with the provisions of the Payment of Gratuity Act. As*

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<sup>1</sup> CA (Writ) Application No: 282/2018, CA Minutes on 20.12.2019 on Page 15.

*gratuity is payable in terms of Section 5(1) only at the cessation of employment, and in the light of the factual circumstances of this case, it is the view of this Court that the 6<sup>th</sup> Respondent, by accepting the said payment of gratuity, has acknowledged that his contract of employment evidenced by '6R1' came to an end on 31<sup>st</sup> January 2012.”*

Further, the 3<sup>rd</sup> Respondent in the instant Application was fully aware of the consequences of entering into a fixed-term contract of employment upon his request and that he is not entitled to the payment of gratuity for any future periods. In *Bogawanthalawa Tea Estates PLC vs Commissioner General of Labour* (supra), in which the facts were similar to the facts of this Application, the Court observed that,

*“The very next day after 'P2' was issued, the Petitioner proceeded to process the gratuity claim of the 6<sup>th</sup> Respondent and made the payment. It was certainly a win-win for both parties, with the Petitioner enforcing its policy on retirement, but yet being able to have the services of the staff that it wanted even beyond the age of retirement, and the 6<sup>th</sup> Respondent continuing to enjoy the same rights and privileges that he enjoyed as General Manager, subject of course to a recalibration of the gratuity clock.*

*What is significant is that even the 6<sup>th</sup> Respondent does not call this arrangement a 'sham', which was executed to benefit both the Petitioner and the 6<sup>th</sup> Respondent. This Court is making this observation as it is conscious that an employer can take advantage of the bargaining power that it has over its employees and for instance, force an employee who is a long way from his retirement age to resign, on the understanding that he would be re-employed on contract basis simply to avoid paying gratuity for a longer period on a higher*

*salary. This kind of arrangement can be categorized as being a 'sham' transaction, but that is certainly not what happened in this instance” (at Page17).*

The learned DSG appearing for the 1<sup>st</sup> and 2<sup>nd</sup> Respondents in the instant Application drew the attention of Court to the judgement in *The Finance Company Limited vs Kodippilli*<sup>2</sup>. Even though the facts of this Application and the facts of Kodippilli’s case seem identical, two features could be distinguished the present Application and the said case.

(a) In Kodippilli's case, the employee requested from the employer before he reached the retirement date, by letter dated 17<sup>th</sup> May 1999, to extend his services for one year with effect from 22<sup>nd</sup> May 1999, and he continued to work on the understanding that he had been given an “extension”. However, in the present Application, the 3<sup>rd</sup> Respondent's request specifically was for an extension by way of a fixed-term contract.

(b) In Kodippilli's case, after the service of the employee was extended, by letter dated 4<sup>th</sup> June 1999 he specifically requested from the employer to differ the payment of gratuity in view of the extension granted. However, in the present Application, the 3<sup>rd</sup> Respondent being the Financial Controller of the Petitioner Company was aware that he would not be entitled to gratuity after retirement and therefore he accepted the gratuity that was paid to him.

In appeal, in the case of *Brown and Company Limited vs The Commissioner of Labour and others*,<sup>3</sup> the Supreme Court held that,

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<sup>2</sup> (2005) 3 Sri LR 281; Sriskandarajah, J (as he then was).

<sup>3</sup> SC Appeal No. 84/2011; SC Minutes of 03.08.2016.

*“(We) find that the Court of Appeal has gone wrong in its judgment by having decided that the service was not interrupted just because the Complainant Respondent had physically come to work on the very next day after the date of retirement at 55 years. **The Court of Appeal had ignored the fact that he was retired and then he accepted the fixed term contract and commenced services a new according to the contract and come on the next day as a worker on contract basis**” (emphasis added).*

When considering the above-stated facts of the instant Application and the Court decisions, this Court is of the view that the decision of the 1<sup>st</sup> and 2<sup>nd</sup> Respondents that P9 is a continuation of the contract of employment that existed as of 18.09.2008, is illegal, irrational, arbitrary and *ultra vires* on the following grounds.

- (a) The 3<sup>rd</sup> Respondent gave prior notice to the Petitioner Company that his contract of employment would be terminated upon his retirement on 18.08.2008 (vide P4 and P5).
- (b) The 3<sup>rd</sup> Respondent sought an extension of service by way of a fixed-term contract of employment at the end of the period specified in P4;
- (c) The Petitioner Company did not forcibly pay gratuity to the 3<sup>rd</sup> Respondent, and the gratuity payment was approved and accepted by the 3<sup>rd</sup> Respondent, knowing well the consequences of accepting the said payment.
- (d) The arrangement reflected in P9 was a result of a negotiation between the Petitioner Company and the 3<sup>rd</sup> Respondent and was not an arrangement that was thrust on the 3<sup>rd</sup> Respondent.

In *Brown and Company Limited vs The Commissioner of Labour and others* (supra), it was held that,

*“I am of the opinion that having accepted the legally due gratuity at the age of 55 years the Respondent cannot make a claim to be paid gratuity for a period of time for which he was paid once. The moment gratuity is accepted for the first segment of 24 years, he accepts and concludes that he has got gratuity for that period. He is estopped in law from making any claim for that past period for which he accepted gratuity once.”*

The 1<sup>st</sup> and 2<sup>nd</sup> Respondents in the Application at hand have not considered the above-stated material that the parties placed before them which is paramount in deciding the issue before them. The consequence of the failure to consider relevant material has been set out in **De Smith's Judicial Review**<sup>4</sup> as follows:

*“When exercising a discretionary power, a decision-maker may take into account a range of lawful considerations. Some of these are specified in the statute as matters to which regard may be had. Others are specified as matters to which regard may not be had. There are other considerations which are not specified but which the decision-maker may or may not lawfully take into account. If the exercise of discretionary power has been influenced by considerations that cannot lawfully be taken into account, or by the disregard of relevant considerations required to be taken into account (expressly or impliedly), a court will normally hold that the power has not been validly exercised.”*

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<sup>4</sup> Harry Woolf, Jeffrey Jowell and Andrew Le Sueur, 6th Edition at page 280.

This Court is of the view that the decision taken by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents without considering the material that was presented to them by the Petitioner Company makes the said decision illegal, irrational, arbitrary, unreasonable and *ultra vires*, and is a decision therefore, as stated in *Council of Civil Service Unions vs Minister for the Civil Service*<sup>5</sup>, " is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it." Thereby, the Petitioner Company is entitled to the reliefs sought in this Writ Application.

Under the above-stated circumstances, this Court is of the view that the decisions reflected in P31, P35 and P39 are unreasonable, irrational, arbitrary, illegal and *ultra vires* and are liable to be quashed by Writs of *Certiorari*. This Court accordingly grant reliefs sought in the prayer (b), (c) and (f) to (h) to the Petition. No costs ordered.

*Application allowed.*

**JUDGE OF THE COURT OF APPEAL**

**M.T. MOHAMMED LAFFAR, J.**

**I agree.**

**JUDGE OF THE COURT OF APPEAL**

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<sup>5</sup> 1985 AC 374.