

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

**In the matter of an Application for a mandate  
in the nature of *Writ of Certiorari and  
Mandamus* under article 140 of the  
Constitution of the Democratic Socialist  
Republic of Sri Lanka**

Jathika Sevaka Sangamaya,  
No. 416, Kotte Road,  
Pitakotte.

**PETITIONER**

**CA/WRIT/209/2013**

**Vs,**

1. South Asia Gateway Terminals (Pvt) Limited,  
P.O. Box 141, Colombo.
2. Mrs. V.B. P.K. Weerasinghe,  
The Commissioner General of Labour  
Department of Labour,  
Narahenpita,  
Colombo 05.
3. P. Madanayaka,  
Additional Commissioner General of Labour  
(Trade Union),  
Department of Labour,  
Narahenpita, Colombo 05.

4. P. K. Sanjeewani,  
Additional Commissioner General of Labour  
(Trade Union),  
Colombo South District Labour Office,  
6<sup>th</sup> Floor, Department of Labour,  
Narahenpita,  
Colombo 05.
5. M. Thiranagama,  
Senior Labour Officer,  
Colombo South District Labour Office,  
6<sup>th</sup> Floor, Department of Labour,  
Narahenpita,  
Colombo 05.

**RESPONDENTS**

**Before: Vijith K. Malalgoda PC J (P/CA) &  
H.C.J. Madawala J**

**Counsel:** Ronald Perera PC with Naleen Amarajeewa, for the Petitioner

Maithee Wickremasinghe PC with K. Srikantharajah, Suren Fernando and Rakith Jayatunga for the 1<sup>st</sup> Respondent

Vikum De Abrew DSG for 2<sup>nd</sup> to 5<sup>th</sup> Respondents

Argued on: 18.09.2015

Written Submission on: 07.12.2015

**Order on: 26.02.2016**

## Order

### **Vijith K. Malalgoda PC J**

Petitioner to the present application Jathika Sevaka Sangamaya a Trade Union registered under the Trade Unions Ordinance No. 14 of 1935 (as amended) has come before this court seeking inter alia,

- b) Grant and issue an order in the nature of *Writ of Certiorari* quashing the decision dated 17.08.2011 and 15.10.2012 marked F and G respectively of the 2<sup>nd</sup> to 5<sup>th</sup> Respondents not to issue a direction to the 1<sup>st</sup> Respondent to provide check off facility to the Petitioner and not to refer the dispute relating to the said check off for arbitration
- c) Grant and issue an order in the nature of *Writ of Mandamus* directing the 2<sup>nd</sup> to 5<sup>th</sup> Respondents to issue a direction to the 1<sup>st</sup> Respondent to provide check off facility to the Petitioner as requested by the letter marked A and

### **Alternatively**

- d) Grant and issue an order in the nature of *Writ of Mandamus* directing the 2<sup>nd</sup> to 5<sup>th</sup> Respondents to refer the dispute between the Petitioner and the 1<sup>st</sup> Respondent for arbitration.

Petitioner had taken up the position before this court that it has a branch union in the 1<sup>st</sup> Respondent Company with more than 230 subscribing members, whose check off are deducted from their salaries. As alleged by the Petitioner the dispute between the Petitioner and the 1<sup>st</sup> Respondent was commenced due to a refusal by the 1<sup>st</sup> Respondent to check off with regard to 27 employees who has obtained membership of the Petitioner union recently. On a complaint made by the petitioner, an inquiry was held by the officers of the Labour Department and the decision of the said inquiry was communicated to the petitioner's by document produced marked G.

Being dissatisfied with the said decision communicated to the Petitioner by documents marked F and G Petitioner has come before this court seeking relief as referred to above.

The present application is filed before this court in July 2013 and supported for notices on 09<sup>th</sup> September 2013. Out of the two documents the Petitioner sought to quash, document marked F is dated 17.08. 2011. However according to the documentation submitted before this court by the Petitioner, the Petitioner by letter dated 18<sup>th</sup> May 2012 had requested the 1<sup>st</sup> Respondent to deduct check off of the said 27 employees (A1). The 1<sup>st</sup> Respondent by letter dated 28<sup>th</sup> May 2012 refused the said check off (B) consequent to the said decision the Petitioner went before Labour Department and by letter dated 19<sup>th</sup> October 2012 2<sup>nd</sup> Respondent informed the Petitioner his decision. (G)

However when going through the said document produced marked 'G' this court observes that the said letter refers to a previous communication by the industrial relations division on 17.08.2011 which is produced marked F by the said Petitioner before this court.

The said document F is a decision communicated to the Petitioner by Assistant Commissioner of Labour (Trade Unions) dated 17.08.2011 and in the said decision there is reference to discussions and written submissions tendered by the parties before the Assistant Commissioner.

When compared the two documents the Petitioner is challenging before this court, I observe that it is this document (F) which communicates the decision of the Assistant Commissioner but the 2<sup>nd</sup> letter (G) is only a subsequent communication which confirm the decision in document marked 'F'.

As observed by me earlier, the Petitioner has failed to produce any document produced before the inquiry conducted by the Assistant Commissioner (Trade Unions) and what is before this court is some communication sent by the Petitioner to the Respondents but, there is no reference to discussions and written submission as referred to in document F before this court.

At the argument before this court Respondents have brought these facts before us and argued that the Petitioner is guilty of lashes, Deliberate falsehood, suppression and Misrepresentation of material facts and therefore moved to dismiss this application.

As observed by me earlier, the decision the petitioner is challenging before this court is made on 17<sup>th</sup> August 2011 and he had come before this court in July 2013. The Petitioner has failed to explain its delay in coming before this court but, produced some documents to establish that the complaint was first made in May 2012 and the subsequent correspondents were made between May 2012 and October 2012 and the decision was communicated to the Petitioner by letter dated 15.10.2012.

Even though the Petitioner has challenged the decision in 'F' and moved to quash the said decision, the Petitioner has deliberately kept the proceedings of the said inquiry away from this court.

The second decision the Petitioner seek to quash i.e. document marked 'G' too have been received by the Petitioner's Office on 19.10.2012 and the Petitioner has produced marked 'H' the proceedings of a meeting between the representatives of the Petitioner and the 4<sup>th</sup> Respondent held on 23.10.2012 in order to clarify the position taken up by the 4<sup>th</sup> Respondent. Since then the Petitioner has taken 9 months to come before this court but he has failed to explain this delay before us. In the case of *President Malalgodapitiya Co-operative Society V. Arbitrator of Co-operative Societies Galle (1959) 151 NLR 167* Wijewardena CJ considered a delay of 07 months as follows,

“I do not think that in the circumstances of this case the Petitioners have made out a case for obtaining relief from this court on this Petition as there has been undue delay in applying for the Writ.”

Jayasuriya (J) in the case of *Jayaweera V. Assistant Commissioner of Agrarian Services Ratnapura and Another 1996 (2) Sri LR 70* whilst discussing the question of delay observed;

“A Petitioner who is seeking relief in an application for the issue of a Writ of Certiorari is not entitled to relief as a matter of course, as a matter of right or as a matter of routine. Even if he is entitled to relief, still the court has discretion to deny him relief having regard to the conduct, delay, laches, waiver, submission to jurisdiction are all valid impediments which stand against the grant of relief.”

A part from delay in making the present application, as observed by me earlier, the Petitioner has suppressed certain facts from this court. In the document produced marked ‘F’ which carries a decision by the Assistant Commissioner of Labour (Trade Unions) dated 17.08.2011 there is reference to discussions and written submissions tendered by the parties before the said Assistant Commissioner but the Petitioner neither referred to such meetings in its Petition nor, annexed any documentation with regard to the correspondents with Assistant Commissioner of Labour (Trade Unions) in the year 2011. It appears that this is a deliberate act by the Petitioner to suppress a long delay from this court.

Even though the Petitioner had made all measures possible to suppress this fact they were compelled to produce document marked ‘F’ before this court since there was reference to document ‘F’ in the document ‘G’ which was relied by the Petitioner.

As observed by me earlier, when compared the document ‘G’, document ‘F’ was the letter which carried the decision of the 3<sup>rd</sup> Respondent to the Petitioner but the Petitioner has made all endeavors to suppress the process under which said document was issued by not bringing any correspondence with regard to the meetings with the 3<sup>rd</sup> Respondent.

The necessity of a full and fair disclosure of material facts were discussed by Pathirana J in the case of *Alponso Appuhamy V. Hettiarachchi 1973 NLR 131* as follows,

“....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 Edmond de Poignac [1917KB Div-486] Although this case deals with a *Writ of Prohibition* the principles enunciated are applicable to all cases of Writs or Injunction. 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....”

In the case of *Sarath Hulangamuwa V. Siriwardena, Principle Visaka Vidyalaya, Colombo 05 and The Others 1986 (1) Sri LR 275*, Court of Appeal observed the importance of both the delay in seeking remedy and non disclosure of the material facts as follows,

“Certiorari being a discretionary remedy will not be granted where there was;

- a) Such delay in seeking the remedy as would frustrate the remedy even if it could be granted as the class had reached the third term and the child herself was now overaged

- c) Want of uberrimae fides in that there was non-disclosure of the material facts that the Petitioner had a residence in Dehiwela far away from Visaka Vidyalaya and the child had since gained admission to Bishops College, Colombo.

When considering the fact and circumstances of the present case this court is of the view that the Petitioner is guilty of deliberate suppression of material facts and delay in seeking remedy from this Court. Therefore I decided to dismiss this application without cost.

**PRESIDENT OF THE COURT OF APPEAL**

**H.C.J. Madawala J**

I agree,

**JUDGE OF THE COURT OF APPEAL**