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

Certis Lanka Security Solutions
(Pvt) Ltd.,
No.15, De Fonseka Place,
Colombo 4.
Petitioner

CASE NO: CA/WRIT/191/2013

Vs.

1. V.B.P.K. Weerasinghe,
   Commissioner General of Labour,
   Department of Labour,
   Narahenpita,
   Colombo 5.
2. L.T.G.D. Dharshana,
   Assistant Commissioner of
   Labour (Colombo East),
   5th Floor, Department of Labour,
   Colombo 5.
3. Nihal Peiris,
   No.248/209, Lotus Grove,
   Hill Street,
   Dehiwala.

   Respondents

Before:	Mahinda Samayawardhena, J. Arjuna Obeyesekere, J.
Counsel:	Nalin Ladduwahetty, P.C., with Indra Ladduwahetty for the Petitioner. Suranga Wimalasena, S.S.C., for the 1st and 2nd Respondents. Nihal Fernando, P.C., with Rohan Dunuwille for the 3rd Respondent.
Argued on:	07.07.2020
Decided on:	06.08.2020

Mahinda Samayawardhena, J.

The Petitioner company has filed this application against the 1st Respondent Commissioner General of Labour and the 3rd Respondent employee, seeking to quash P14 and P15 whereby the Petitioner was directed to pay a sum of Rs. 597,590 to the 3rd Respondent, as arrears of salary for the months of June and July 2009.

The salary slip for the month of January 2009 marked 1R4(c) shows that the 3rd Respondent's last drawn monthly salary was Rs. 298,795. As seen from 3R2, the 3rd Respondent resigned from the Petitioner company on 06.08.2009.

According to the Petitioner, the 3rd Respondent had not been an employee of the Petitioner company at any time whatsoever and was only a non-executive director of the Board of the Petitioner

company. Conversely, the position of the 3rd Respondent is that he was the Finance Director of the Petitioner company at the material time.

Let me now narrate the sequence of events, in the manner the Petitioner states in the petition, regarding the inquiry held by the 1st Respondent into the complaint of the 3rd Respondent marked P2 on arrears of salary.

According to the Petitioner, the Petitioner received the letter P7 from the 1st Respondent on 02.04.2013, requiring the Petitioner to attend the inquiry on 04.04.2013. The Petitioner moved for a postponement, which was allowed, and the inquiry was put off for 10.04.2013. On 10.04.2013 also the Petitioner sought a postponement, which was again allowed. Then, on or around 17.04.2013, the Petitioner received a notice requesting that it attend the inquiry on 08.05.2013. Again, the Petitioner moved to postpone the inquiry, seeking further time to furnish the information sought; this was also allowed. Thereafter the Petitioner received a telegram on 29.05.2013, requesting that it attend the inquiry at 1.30 p.m. on the same day. The Petitioner says it informed the 1st Respondent (presumably over the telephone) of its inability to attend the inquiry on such short notice. It appears no representative of the Petitioner was sent to the place of inquiry seeking a postponement.

On all the days scheduled for the inquiry, the 3rd Respondent, it appears, was present and prepared.

The 1st Respondent had gone ahead with the inquiry *ex parte* on 29.05.2013 and made the impugned Order against the Petitioner.

It is the position of the 1st Respondent, as presented in his statement of objections, that the Petitioner adopted the above *modus operandi* of delaying the inquiry in order to have the 3rd Respondent's claim prescribed *in toto*.

The 3rd Respondent by P2 complained to the 1st Respondent about non-payment of salary for five months, i.e. March-August 2009, and non-payment of gratuity for 1988-2009.

However, by the time the impugned Order was made by the 1st Respondent, the claim for arrears of salary for the first three of the five months was prescribed in terms of section 50B(c) of the Shop and Office Employees (Regulation of Employment and Remuneration) Act, No.19 of 1954, as amended.

It is against this backdrop, according to the 1st Respondent, the last inquiry date was informed to the Petitioner on short notice and the inquiry was held without further delay.

The contention of the Petitioner is that it had a legitimate expectation the inquiry on 29.05.2013 would be postponed. I am unable to agree. The Petitioner may have had such an expectation, but it can by no means be considered a legitimate expectation in the eyes of the law.

At the *ex parte* inquiry, the 3rd Respondent had produced documentary evidence to substantiate his claim. Among these were his Employees' Provident Fund Certificate of Membership

with the B-card and Central Bank Statement of Accounts marked 1R1, 1R3(a), 1R3(b); his Employees' Trust Fund Statement of Accounts marked 1R2(a) and 1R2(b); and salary slips marked 1R4(a), 1R4(b) and 1R4(c). Based on this evidence, the 1st Respondent made the impugned Order dated 12.06.2013, directing the Petitioner to pay arrears of two months' salary to the 3rd Respondent.

It is thereafter that the Petitioner, with great vigour, rushed to this Court on 09.07.2013 to have the said Order set aside. Together with the petition, the Petitioner tenders a spate of documents which should have been tendered to the 1st Respondent at the inquiry. This Court, in the exercise of writ jurisdiction, cannot hold an inquiry into the payment of arrears of salary *de novo*. This has already been done, albeit *ex parte*.

In the facts and circumstances of this case, as narrated by the Petitioner itself, I do not think the decision of the 1st Respondent to have the inquiry *ex parte* is unreasonable.

The Petitioner has tendered several documents to this Court, such as P7-P23, P26, P28-P32 P26, P49, P51, to say the 3rd Respondent was not the Finance Director of the Petitioner company and the position was held by another person by the name of Sampath Witharana. Conversely, the 3rd Respondent has tendered several documents, such as 3R3-3R22, to say it is he who was the Finance Director of the Petitioner company. Drawing the attention of the Court to the document marked 3R3 wherein he is identified as the Finance Director, the 3rd

Respondent says the said document has been signed by none other than the present Chairman of the Petitioner company.

The 3rd Respondent, with reference to the documents marked 3R14, 3R15, 3R16, submits that deduction and payment of Employees' Provident Fund, Employees' Trust Fund and Income Tax Deductions (PAYE Tax) are clear proof the 3rd Respondent was an employee of the Petitioner company. I am in agreement with this contention.

In response, the Petitioner, producing *inter alia* P5, says the 3rd Respondent coerced other officers of the Petitioner company into remitting contributions in the 3rd Respondent's name to the Employees' Provident Fund and Employees' Trust Fund. Investigation into these matters is clearly outside the purview of the writ Court and perhaps even the Commissioner General of Labour.

Hence, even on merits, I cannot say the decision of the 1st Respondent that the 3rd Respondent was an employee of the Petitioner company and he is entitled to his salary for the months of June and July 2009 is outrageous or perverse. Therefore, the Petitioner cannot succeed in this application.

Before I part with this Judgment let me also add the following.

In *Hotel Galaxy (Pvt) Ltd v. Mercantile Hotels Management Ltd*,[1] the Supreme Court, citing *Loku Menika v. Selenduhamy*,[2] *Habibu Lebbe v. Punchi Etana*,[3] *Caldera v. Santiagopulle*,[4] *Weeratne v.*

[1] [1987] 1 Sri LR 5.
[2] (1947) 48 NLR 353.
[3] (1894) 3 CLR 85.

Secretary, D.C. Badulla,[5] *Dingirihamy v. Don Bastian*,[6] *Bank of Ceylon v. Liverpool Marine & General Insurance Co Ltd*,[7] and *Nagappan v. Lankabarana Estates Ltd*,[8] held: "*A party seeking to canvass an order entered ex-parte against him must apply in the first instance to the court which made it. This is a rule of practice which has become deeply ingrained in our legal system.*"

A party cannot, without having purged default in the original Court by which the *ex parte* Order was made, straightaway come before the Court of Appeal against such Order on merits. (*Jana Shakthi Insurance v. Dasanayake,*[9] *Penchi v. Sirisena.*[10]) However, in an exceptional situation, the Court of Appeal can exercise revisionary jurisdiction to set aside an *ex parte* Judgment or Order made by a lower Court, if it is palpably wrong, perverse and results in a manifest failure of justice. (*Mrs. Sirimavo Bandaranayake v. Times of Ceylon Limited.*[11])

In my view, this principle of law shall not be confined to judicial proceedings but shall be extended to inquiries by any tribunal exercising quasi-judicial or administrative powers that affect the rights of citizens.

Accordingly, in the instant matter, the Petitioner cannot straightaway come before this Court against the *ex parte* Order

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[4] (1920) 22 NLR 155 at 158.
[5] (1920) 2 CLR 180.
[6] (1962) 65 NLR 549.
[7] (1962) 66 NLR 472.
[8] (1971) 75 NLR 488.
[9] [2005] 1 Sri LR 299 at 303.
[10] [2012] 1 Sri LR 402 at 408.
[11] [1995] 1 Sri LR 22 at 40.

made by the 1st Respondent, more so as the impugned Order is not, as I have already stated, palpably erroneous.

I dismiss the application of the Petitioner with costs.

Judge of the Court of Appeal

Arjuna Obeyesekere, J.
I agree.

Judge of the Court of Appeal