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

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

CA-WRT-433/2022

Lanka Milk Foods (CWE) PLC

No. 579/1, Welisara

Ragama.

Petitioner

Vs.

1. B.KJ. Prabath Chandrakeerthi
   Commissioner General of Labour

   Labour Secretariat PO Box 575

   Colombo 05.

2. T.M. I. Lakmali
   Assistant Commissioner of Labour
   District Labour office
   Ja-Ela

3. K.L.D.V. Rathnakumari
   Assistant Commissioner of Labour
   District Labour office
   Ja-Ela (Former ACL Ja-Ela)

4. Jasenthu Lioyanage Prasanga de Silva
No. 272
Gonawala
Kelaniya.
Respondents

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

Counsel: Shivan Cooay and Damithu Surasena for the Petitioners
Nisala Seniya Fernando for the 4th Respondents.
Manohara Jayasinghe, DSG for the State.

Argued On: 06.12.202

Written Submissions: On 17.12.2024 (by the 1st and 2nd respondent)
12.12.2024 (by the 4th respondent)

Judgment On: 18.12.2024

B. Sasi Mahendran, J.

The Petitioner instituted this application by petition dated 15.11.2022 seeking inter alia writs of Certiorari to quash the Award dated 25.09.2020 marked P17 and the Certificate dated 02.07.2021 marked P2.

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 4th Respondent joined a subsidiary of the Petitioner Company, Lanka Diaries (Pvt) Ltd, on 28th April 1998 as a Sales Representative. Thereafter, by letter dated 22.09.1999, the 4th Respondent was transferred to the Petitioner Company with effect from 01.06.1999 and on 27.11.2009, the 4th Respondent was promoted to grade 'Non-Executive Grade II'. The 4th Respondent worked in the Petitioner Company until his termination on 28.01.2019.

The Petitioner states that, around September 2018, 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 4th Respondent also had aided and abetted such fraudulent activities.

The Petitioner further states that while the investigations were ongoing, the 4th Respondent submitted a letter on 31.12.2018 marked P6 to the Director Operations of the Company stating his knowledge of such fraudulent activities committed by the Area Sales Manager

and Distribution Agent and sought that the officers who have been involved in such fraudulent activities be punished.

The Petitioner states that the losses mentioned by the 4th Respondent were confirmed by a subsequent letter dated 02.01.2019 by a Distribution Agent.

The Petitioner avers that thereafter, investigations were initiated which revealed that the 4th 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 4th 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.

In this context, 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 4th Respondent for criminal breach of trust, criminal misappropriation, fraud, and undue enrichment.

The Petitioner states that on 29.07.2019, the Petitioner was notified of the application bearing No. 31/34/2019 filed by the 4th Respondent to the Labour Tribunal of Wattala challenging the termination of his employment by the Petitioner and seeking inter alia reinstatement or compensation in the absence of such re-instatement. This application is pending before the said Labour Tribunal.

The Petitioner states that on 19.08.2019, the Petitioner received a Notice signed by the 3rd Respondent requesting the Petitioner to participate in an inquiry on 28.08.2019 on a purported complaint by the 4th Respondent against the Petitioner for inter alia non-payment of gratuity.

On 28.08.2019, representatives of the Petitioner participated in the inquiry and submitted that this should be resolved in the Labour Tribunal directing the 4th Respondent to file an application in the Labour Tribunal.

The Petitioner states that several correspondences were exchanged between the Petitioner and the Respondents regarding the legality of continuing an inquiry by the office of the 1st Respondent, particularly when there is an application pending before the Labour Tribunal on the same issue.

The Petitioner further states that the Petitioner participated at the inquiry of the 3rd Respondent on 09.09.2020 to determine on the correctness of the forfeiture of gratuity and brough to the notice of the 3rd Respondent the reasons for such forfeiture and that the Petitioner has a right under Section 13 of the Payment of Gratuity Act as amended.

The Petitioner states that to its utter dismay, by letter dated 25.09.2020 marked as P17, the 3rd Respondent made a purported award against the Petitioner stating that a cumulative sum of both gratuity and surcharge of Rs. 599,300/- was due and payable to the 4th Respondent and that failure to pay the said sum would result in further legal action.

Thereafter, summons were served on the Petitioner for case bearing No.60927/21 (Labour) in the Magistrate's Court of Welisara requiring the Petitioner to appear before the Court for non-payment of gratuity of Rs. 599,300/-.

The main gravamen of the Petitioner is that the decision contained in the documents marked as P2 and P17 is illegal and ultra vires.

In this context, the Petitioner invokes the writ jurisdiction of this Court *inter alia* seeking a writ of Certiorari to quash the award marked P17 and the Certificate dated 02.07.2021 marked P2.

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 Industrial Disputes Act 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 certificate marked P2 and the award marked P17 by way of writs of Certiorari. We allow the 4th 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