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

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

CA (Writ) Application No: 224/2018

Kurunegala Plantations Limited,
P.O. Box 25,
No. 80, Dambulla Road,
Kurunegala.

PETITIONER

1. R. P. A. Wimalaweera,
   Commissioner General of Labour.

2. Manoj Priyantha,
   Commissioner of Labour,
   Industrial Relations Division,
   Department of Labour,
   Labour Secretariat, Colombo 5.

3. A. D. S. R. Wijayasinghe,
   Assistant Commissioner of Labour,
   District Labour Office,
   Kurunegala.

4. N. M. S. K. Nillegoda,
   100/4, Galkanda Road,
   Aniwatta, Kandy.

5. The Attorney General,
   Attorney General's Department,
   Colombo 12.

RESPONDENTS

Before:	**Mahinda Samayawardhena, J** **Arjuna Obeyesekere, J**
Counsel:	Razik Zarook, P.C., with Chanakya Liyanage for the Petitioner
	Ms. Anusha Fernando, Deputy Solicitor General for the 1st – 3rd and 5th Respondents
	Indra Ladduwahetty for the 4th Respondent
Argued on:	16th June 2020
Written Submissions:	Tendered on behalf of the Petitioner on 29th July 2019.
	Tendered on behalf of the 1st – 3rd and 5th Respondents on 3rd July 2019.
	Tendered on behalf of the 4th Respondent on 29th July 2019.
Decided on:	24th July 2020

Arjuna Obeyesekere, J

The issue that arises for determination in this application is whether the decision of the 1st Respondent, the Commissioner General of Labour, contained in the letter dated 21st March 2018, marked '**P25**', directing the Petitioner to pay the 4th Respondent gratuity based on the last drawn salary of the 4th Respondent at the rate set out in Circular marked '**1R4B**', is illegal and/or *ultra vires* the powers of the 1st Respondent.

The facts of this matter briefly are as follows.

The Petitioner is a company duly incorporated under the provisions of the Companies Act No. 7 of 2007, and the entirety of its shares is presently held on behalf of the Government by the Secretary to the Treasury.

The Petitioner states that the 4th Respondent was appointed as its Chief Executive Officer on 1st July 2005, on contract basis, for a period of three years, but subject to renewal at the end of each year, depending on satisfactory performance. A copy of the contract of employment has been marked '**P4**'. The Petitioner states that at the request of the 4th Respondent that his services be made permanent, '**P4**' was terminated prematurely on 31st May 2007, and by a letter dated 25th May 2007 marked '**P5**', the 4th Respondent was appointed as the Chief Executive Officer on a permanent basis with effect from 1st June 2007, and duly absorbed into the permanent cadre of the Petitioner.

The Petitioner states that it paid all its employees gratuity calculated at the rate of half months salary for each year of completed service, which is the minimum rate at which gratuity must be paid in terms of the Payment of Gratuity Act No. 12 of 1983, as amended (the Act). A Board Paper marked '**P6**' signed by (a) the 4th Respondent in his capacity as the Chief Executive Officer, (b) the Manager (Finance), and (c) the Manager (Human Resource and Administration) had recommended that the gratuity payable to all those employees who retire with effect from 1st February 2013 be enhanced to one month's salary for each completed year of service. It is not in dispute that the proposal in '**P6**' was approved by the members of the Board of Directors of the Petitioner (the Board), subject to the amendment proposed by the Board that the new scheme would apply in respect of employees who retire after completion of 10 years of service. The said scheme was implemented with effect from 1st February 2013 by way of Circular No. KP/2013/05 marked '**1R4B**', which reads as follows:

“සි/ස කුරුණෑගල වැව්ලි සමාගමේ අඛණ්ඩව වසර 10 කට නොඅඩු සේවාකාලයක් සපුරා ඇති සේවක මහත්ම/මහත්මින් සේවයෙන් ඉවත්වීමේදි ගෙවනු ලබන පාරිතෝෂිතය ගණනය කිරීමේදි මාස ½ ක වැටුප වෙනුවට මසක වැටුප පාදක කර ගැනීමට 2013-01-24 දින පැවති සි/ස කුරුණෑගල වැව්ලි සමාගමේ 281 වැනි අධ්‍යක්ෂ මණ්ඩල රැස්වීමේදි තීරණය කර ඇති බව ඉතා සතුටින් දන්වා සිටිමු. කුරුණෑගල වැව්ලි සමාගම අත්පත් කරගෙන ඇති අඛන්ඩ ප්‍රගතිය හා මූල්‍ය ස්ථාවරත්වය සලකාබලා ඒ වෙනුවෙන් කැපවූ සේවක මහත්ම/මහත්මින් දිරිගැන්වීමේ අරමුණු කොටගෙන අධ්‍යක්ෂ මණ්ඩලය විසින් මෙම තීරණය ගත් බවද ඔබ වෙත දැනුම් දෙමු.

මේ සඳහා හිමිකම් ලබන්නේ සේවා කාලය කඩවීමකින් තොරව අඛණ්ඩව වසර 10 නොඅඩු සේවා කාලයක් සපුරා ඇති සේවක මහත්ම/මහත්මින් වේ.

මෙය අදාල වන්නේ 2013/02/01 දින හෝ ඊට පසු සේවයෙන් විශ්‍රාම ගනු ලබන සේවකයන් සඳහා වේ.

ඒ අනුව වසර 10 ඉක්මවූ සේවකයන් සඳහා පාරිතෝෂිත ගණනය කිරීම පහත පරිදි කල යුතුය.

<u>මාසික වැටුප් ලබන සේවකයන් සඳහා</u>

අවසානයට ලැබූ මාසික වැටුප X සේවා වර්ෂ ගණන = ලැබිය යුතු පාරිතෝෂික මුදල

<u>දෛනික වැටුප් ලබන සේවකයන් සඳහා</u>

අවසානයට ලැබූ දින 28 ක වැටුප X සේවා වර්ෂ ගණන = ලැබිය යුතු පාරිතෝෂික මුදල

සැලකිය යුතුයි : සේවා කාලය වසර 05 නොඅඩු හා වසර 10 නොඉක්මවූ සේවකයන් සඳහා පාරිතෝෂිත ගණනය කිරීම් කල යුතු වන්නේ පාරිතෝෂිත ගෙවීමේ පනතට අනුව මාස ½ වැටුප පදනම් කරගනිමිනි. මේ සඳහා 2012-09-11 දිනැති KP/2012/14 චක්‍රලේඛ උපදෙස් පිළිපදින ලෙස දන්වා සිටිමු.

පාරිතෝෂිත ගෙවීම් පනතට අදාල අනිකුත් කොන්දේසි හා නියමයන් පෙරපරිදිම නොවෙනස්ව පවතිනු ඇත. ”

Even though the above Circular has been issued pursuant to approval granted for the said scheme by the Board of the Petitioner, the Petitioner is now

alleging that the 4th Respondent *'has tabled and got approval of the Board to the said Board Paper arbitrarily, without following due process or procedure or by obtaining the approval of the Ministry of Finance.'*[1]

The Petitioner states that the increase of the gratuity to one month's salary for each year of completed service had been queried by the Auditor General on the basis that such an increase is contrary to the provisions of the Act. It appears that the Auditor General has not taken into consideration the provisions of Section 10 (1) of the Act which provides for such an increase. The issues arising from the said audit query had been discussed by the Board of the Petitioner at a meeting held on 11th May 2016. According to the minutes of the said meeting marked '**P16**', the representative of the Secretary to the Treasury on the Board of the Petitioner had stated that, he '*was of the view that since the Company is already awarding incentives to the employees the current method of payment of the full one month's salary as gratuity is unsuited and will create an unnecessary precedent to other companies as well. Thereafter he added that if a full one month's salary is paid as gratuity, then the incentives should not be paid*.' This demonstrates that the members of the Board did not consider the payment of the enhanced gratuity as illegal, or as an arbitrary decision taken by the 4th Respondent. The Board had decided that the Circular '**1R4B**' be declared null and void and to pay gratuity calculated at half months salary for each year of completed service to those employees who retire after 25th April 2016, which is the date that the Petitioner had received the letter from the Auditor General. Circular No. KP/2016/10 marked '**P17**' had been issued to implement the said decision with effect from 25th April 2016.

The initial contract of appointment '**P4**' stipulated that the 4th Respondent shall be paid an all inclusive monthly salary of Rs. 70,000. The letter of

[1] Vide paragraph 16 of the petition.

appointment that was issued thereafter, '**P5**' specified that the 4th Respondent shall be entitled to an all inclusive remuneration of Rs. 80,000. '**P5**' also specified that the '*granting of increments will be at the sole discretion of the Board of Directors, depending on your performance.*' The Petitioner is alleging that the 4th Respondent *in violation of applicable financial regulations has increased his salary to Rs. 352,425 inclusive of a budgetary allowance of Rs. 47,125 to which he is not entitled.*[2]

The 4th Respondent, who was due to retire from service on 26th May 2016, had requested by a letter dated 19th May 2016 marked '**P7**' that the gratuity calculated on the salary last drawn by him be paid in terms of the Circular '**1R4B**'. Almost a year later, the Petitioner informed the 4th Respondent by letter dated 2nd May 2017 marked '**P8**' as follows:

> "2016.05.25 දින සේවයෙන් විශ්‍රාම ගැනීමට අදාලව ඔබගේ පාරිතෝෂික දිමනා සැකසීම සඳහා අදාල කරගත යුතු වැටුප සම්බන්ධයෙන් ප්‍රශ්නකාරී තත්ත්වයක් පැනනැගුණ හෙයින් ඒ පිළිබඳව කළමණාකරන සේවා දෙපාර්තමේන්තුවෙන් නිසි උපදෙසක් ලැබෙන තෙක් ඔබගේ පාරිතෝෂික දිමනා සැකසීම ප්‍රමාද විය.
>
> 2016.12.21 දින පැවති සී/ස කුරුණෑගල වැව්ලි සමාගමේ වාර්ෂික මහා සභා රැසිවිමේදි මේ ගැටළුව විසඳෙන තුරු ඔබගේ පාරිතෝෂික දිමනාව රු. 72,300/- ලෙස වූ වැටුප පාදක කරගනිමින් සැකසිය යුතුබව හා ඒ පිළිබඳව ඔබ වෙත දැණුම්දෙන ලෙස තීරණය කොට ඇත.

Dissatisfied by the above decision of the Petitioner, the 4th Respondent had complained to the Department of Labour that the gratuity payable to him has not been paid. The Department of Labour had conducted an inquiry with the participation of the Petitioner and the 4th Respondent, and by a letter dated 21st March 2018 marked '**P25**' informed the Petitioner that it is liable to pay the 4th Respondent a sum of Rs. 3,053,000 being the gratuity payable for a

[2] Vide paragraph 20 of the petition.

period of ten years calculated at the rate of (a) one month's salary for each year of completed service; (b) on the salary last drawn by the 4th Respondent, together with a surcharge of 30% on such sum, as there has been a delay in the payment of gratuity.[3]

Dissatisfied by the said decision, the Petitioner instituted this application, seeking *inter alia* the following relief:

a) A Writ of Certiorari to quash the notice marked '**P25**';

b) A Writ of Prohibition preventing the 1st – 3rd Respondents from taking steps on the Board Paper marked '**P6**'.

Prior to considering the several arguments presented on behalf of the Petitioner, it would be convenient to lay down the applicable provisions of the Act.

In terms of Section 5(1) of the Act, "*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*."

[3] Vide Section 5(4) of the Act which provides for the imposition of a surcharge at the rates specified therein.

Section 6(2) provides that, "*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*..."

There is no dispute between the parties that the Petitioner has more than fifteen employees and that the 4th Respondent had served more than five years with the Petitioner at the time he retired. Therefore, there is no dispute with regard to the entitlement of the 4th Respondent to the payment of gratuity in terms of the Act. The parties however are at variance on the quantum of the last drawn salary, as well as the rate at which the gratuity should be calculated – i.e. whether the 4th Respondent should only be paid gratuity at the rate of half months salary for each year of completed service as stipulated by Section 6(2) of the Act, or one month, in accordance with the Circular '**1R4B**'. The learned President's Counsel for the Petitioner also submitted that the 4th Respondent had not served a period of ten years and therefore in any event, the Circular '**1R4B**' would not apply to the 4th Respondent. This is an argument that was taken up for the first time at the hearing of this application.

I shall now consider the underlying question relating to each of the three arguments of the learned President's Counsel for the Petitioner, which are as follows:

a) What is the salary at which the gratuity of the 4th Respondent should be calculated?

b) What is the rate at which gratuity should be paid to the 4th Respondent?

c) In any event, has the 4th Respondent completed ten years of service with the Petitioner.

There is no dispute that the Petitioner is a 100% Government owned Company, and that the Petitioner is governed by the provisions of the Companies Act. The Petitioner has its own Articles and Memorandum of Association, and has a Board of Directors who are appointed by its shareholder, the Secretary to the Treasury. There is also no dispute that an employee of the Ministry of Finance referred to as the 'nominee of the Secretary to the Treasury' served on the Board of Directors of the Petitioner, at all times relevant to this application.

The primary objects and the ancillary powers of the Petitioner are set out in the Memorandum of Association marked '**P2**'. In terms of paragraph 9 of the ancillary powers, the Petitioner has the power to '*appoint, engage, employ ... staff and employees, and to remunerate any such (persons) at such rate and in such manner as shall be thought fit.*' Paragraph 16 thereof empowers the Petitioner to, '*grant pensions, allowances, gratuities and bonuses to managers, employees ....*'. The Petitioner states that notwithstanding the above powers in terms of '**P2**', the Department of Management Services, which is a Department within the Ministry of Finance had issued a letter dated 24th March 2007, marked '**P3**' setting out the salary structures applicable to the employees of the Petitioner, as approved by the National Salaries and Cadres Commission, by its letter dated 31st January 2007. Thus, it appears to this Court that by virtue of being a Government owned Company, the power of the Petitioner with regard to payment of salaries was subject to the directions issued to it by the Department of Management Services and the National Salaries and Cadres Commission.

As noted earlier, the initial contract of employment '**P4**' stipulated that the 4th Respondent shall be paid an all inclusive monthly salary of Rs. 70,000. While this Court has not been provided with the salary structure approved by the Department of Management Services that was applicable at the time the letter of appointment '**P4**' was issued, the salary that was paid to the 4th Respondent from 2005 was Rs. 70,000. The salary structure approved by the National Salaries and Cadres Commission annexed to '**P3**' permitted the payment of a sum of Rs. 72,300 to the Chief Executive Officer of the Petitioner. '**P5**' which is the letter of appointment issued to the 4th Respondent in 2007 when he was appointed on a permanent basis not only specified that the 4th Respondent shall be entitled to an all inclusive remuneration of Rs. 80,000, it also specified that the '*granting of increments will be at the sole discretion of the Board of Directors, depending on your performance'.* This is a specific acknowledgment by the Petitioner that the 4th Respondent is entitled to increments.

There is no dispute between the parties that the 4th Respondent has been given the following salary increments by the Board of the Petitioner:

Effective date of increment	Value of Monthly Increment	Has the Board approved it
1st July 2010	10,000	Yes – evidenced by '**4R4**'
1st July 2011	20,000	Yes – vide Board decision '**4R7**'
1st July 2012	25,000	Yes - vide Board decision '**4R10**'
1st January 2013	30,000	Yes - vide Board decision '**4R12**'
1st September 2013	30,000	Yes - vide Board decision '**4R15**'
1st January 2014	30,000	Yes - vide Board decision '**4R18**'
1st December 2014	10,000	-

It would thus be seen that the 4th Respondent has been given periodical salary increments by the Board of Directors of the Petitioner. Quite apart from whether the Board had the power to grant such increments, the fact of the matter is that the Petitioner has suppressed this fact from this Court, and it was left to the 4th Respondent to produce documents to establish that at least part of the increments were approved and granted by the Board. The next matter that is evident by the above documents is that it was not the 4th Respondent who *in violation of applicable financial regulations increased his salary*, but it was the Board who increased his salary. Thus, the allegation made in the written submissions filed on behalf of the Petitioner that *the 4th Respondent, as the former Chief Executive Officer has arbitrarily overdrawn his salary during his tenure of office* is contradicted by the Petitioner's own documents. There is another important matter that this Court must advert to, which is the fact that the Treasury was represented on the Board by its nominee director, and that such director was present, at least when the decisions marked '**4R7**', '**4R10**' and '**4R12**' were taken.

It is in the above factual circumstances that the Petitioner is claiming that for purposes of computing the gratuity of the 4th Respondent, the salary of the 4th Respondent should be calculated at the rate of Rs. 72,300 per month, which is the salary that was approved by the Department of Management Services as far back as in 2007. It is noted that this Court has not been provided with any documents relating to the revision of the salary structure after 2007.

The question that this Court must consider is not whether the Petitioner paid the 4th Respondent a salary which it was not supposed to pay, but the salary that the Department of Labour must take into consideration when deciding the gratuity payable to the 4th Respondent. As noted earlier, in terms of Section 6(2) of the Act, a workman shall be entitled to receive as gratuity a sum

equivalent to 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**.

Section 20 of the Act defines 'wage or salary' to mean:

(a) the basic or consolidated wage or salary;

(b) cost of living allowance, special living allowance or other similar allowance; and

(c) piece rates.

The Department of Labour, having considered the said issue had informed the Petitioner by letter dated 13th November 2017 marked '**1R5D**', as follows:

> "ඉහත අර්ථ නිරූපනයට අනුව සීමාසහිත කුරුණෑගල වැව්ලි සමාගම මගින් එකී සේවකයින්ට ගෙවන ලද වැටුප් ලේඛන පිරික්සීමේදි ප්‍රධාන විධායක නිලධාරී එන්.එම්.එස්.කේ. නිල්ලේගොඩ මහතාට ගෙවා ඇති මූලික හෝ ඒකාබද්ධ වැටුප වන්නේ රු 297,500.00 කි. පිවන වියදම් දිමනාව ලෙස රු. 7800.00 කි. එම මූලික වැටුපේ හා පිවන වියදම් දිමනාවේ එකතුව රු. 305,300.00 කි.
>
> තවද සීමාසහිත කුරුණෑගල වැව්ලි සමාගම විසින් 1958 අංක 15 දරණ සේවක අර්ථසාධක අරමුදල් පනත යටතේ එන්.එම්.එස්.කේ. නිල්ලේගොඩ මහතාට "ඉපැයීම" ලෙස පාදක කරගෙන ඇත්තේ ද රු. 305,300.00 ක ඉහත කී මූලික වැටුප හා පිවන වියදම් දිමනාවේ එකතුවයි.
>
> ඉහත දැක්වූ කරුණු අනුව ඔබ විසින් එන්.එම්.එස්.කේ. නිල්ලේගොඩ මහතාගේ මූලික වැටුප හෝ වේතනය හැටියට රු. 72300.00 ගෙවූ බවක් කම්කරු කොමසාරිස්වරයා ඉදිරියේ සනාථ කොට නැත.
>
> **ඒ අනුව සීමාසහිත කුරුණෑගල වැව්ලි සමාගම විසින් එන්.එම්.එස්.කේ. නිල්ලේගොඩ මහතාට ගෙවන ලද වැටුප් ලේඛන පදනම් කර ගනිමින් ඔහුට හිමි පාරිතෝෂික මුදල ගණනය කර තිබෙන බව මෙහි ලා දැනුම් දෙමි.** "

There is no dispute that the salary last drawn by the 4th Respondent, as confirmed by the documents submitted by the Petitioner to the Department of Labour, was a sum of Rs. 305,300 per month, and therefore, I am of the view that the 4th Respondent is entitled to receive gratuity calculated at that sum. It is not the function of the Department of Labour to determine the legality of such payments, nor can the 1st Respondent embark on a journey to ascertain whether the necessary approvals have been obtained by the Petitioner. I am of the view that the duty cast on the 1st Respondent in terms of Section 6(2) of the Act is to determine the entitlement of Gratuity based on the last drawn salary of the 4th Respondent, and nothing more. Therefore, I am of the view that the decision of the Department of Labour set out in '**P25**', on the quantum of the last drawn salary is not illegal, and therefore, the said decision is not *ultra vires* the powers of the 1st Respondent in terms of the Act.

The next issue that I must consider is whether the decision of the Department of Labour that the gratuity payable to the 4th Respondent should be calculated at the rate of one month's salary for each year of completed service, is illegal or irrational.

The concept of gratuity has been explained by the Supreme Court of India in **Delhi Cloth & General Mills Co Ltd. vs The Workmen**[4] in the following manner:

> "*Gratuity in its etymological sense means a gift especially for services rendered or returned for favours received…in the early stages in the adjudication of industrial disputes gratuity was treated as a gift made by the employer at his pleasure and the workmen had no right to claim it. But since then there has been a long line of precedents in which it has been ruled that a claim for gratuity is a legitimate claim which the workmen*

[4] 1970 Lab.I.C. 787 at 798 (SC) as referred to in *Some Concepts of Labour Law* by S.R. De Silva at page 30.

may make and which in appropriate cases may give rise to an industrial dispute…Gratuity paid to workmen is intended to help them after retirement on superannuation, death, retirement, physical incapacity, disability or otherwise. The object of providing a gratuity scheme is to provide a retiring benefit to workmen who have rendered long and unblemished service to the employer and thereby contributed to the prosperity of the employer. It is not paid to an employee gratuitously or merely as a matter of boon; it is paid to him for long and meritorious service rendered by him to the employer."

There are three sections in the Act which are important for a consideration of this issue. The first is Section 5(1) which sets out the circumstances in which an employer becomes liable to pay gratuity. The second is Section 6(2), which sets out the minimum gratuity that must be paid to an employee who is qualified to receive gratuity in terms of Section 5(1). The third is Section 10 which reads as follows:

"(1) ***Where the gratuity payable to a workman is governed*** *by a collective agreement, award of an Industrial Court or arbitrator under the Industrial Disputes Act or* ***any other agreement****,* ***the computation of such gratuity*** *in respect of his services* ***shall be made in accordance with the terms of such*** *collective agreement, award of an Industrial Court or arbitrator or* ***other agreement****, as the case may be, provided that the gratuity or terminal benefits set out therein are more favourable to the workman than the gratuity payable under this Act.*

(2) No workman shall be entitled to a gratuity or terminal benefit in terms of any collective agreement, award of an Industrial Court or

arbitrator or other agreement in addition to the gratuity under this Act or vice versa."

While Sections 5 and 6 require an employer to pay gratuity at a minimum rate, Section 10 permits an employer and an employee to negotiate a rate higher than the minimum rate. Such higher rate can be governed by a Collective Agreement, an Award of the Industrial Court, Award of an Arbitrator, or can be evidenced by *any other agreement*. I have already noted the manner in which the Board of the Petitioner approved the payment of gratuity at a higher rate and thereafter published the said scheme by Circular '**1R4B**'. I am of the view that there cannot be any doubt that by the said Circular, the Petitioner held out to its employees that if they remain in service for 10 years or more, they would be remunerated at the higher rate. Many employees, and certainly the 4th Respondent would have acted on the said holding out and arranged their careers accordingly. Thus, the offer of the Petitioner has been accepted by the employees including the 4th Respondent, thus giving rise to an agreement contemplated by Section 10(1) of the Act. Hence, it would be unreasonable and illegal to unilaterally amend the said agreement.

I also observe that the Petitioner did not cancel the Circular '**1R4B**' *in limine*. '**1R4B**' having come into operation on 1st February 2013, was cancelled only with effect from 25th April 2016. Thus, by keeping the said Circular open for a period of little over three years and by paying those employees who retired during that period upon completion of 10 years of service, gratuity at the rate of one month's salary for each year of completed service, the Petitioner has acknowledged that it has the power to increase the rate at which gratuity should be paid over and above the statutory minimum set out in Section 6(1).

It appears from the letter dated 21st June 2016 marked '**P11**' sent by the Department of Labour to the Petitioner that the issue of payment of gratuity to the 4th Respondent had been discussed with the Department of Labour in June 2016. '**P11**' reads as follows:

> "උක්ත කරුණට අදාලව මා වෙත එවා ඇති ඔබගේ 2016.06.16 දිනැති ලිපිය හා බැඳේ.
>
> 02. 1983 අංක 12 දරණ පාරිතෝෂික පනත යටතේ 6(2) (අ) වගන්තියේ විධිවිධාන අනුව මාසික වැටුප් ලබන සේවකයින් සම්බන්ධයෙන් එම සේවකයින් විසින් අවසානයට ලබා ගත් වැටුප හෝ වේතනය අනුව ගණන් බලනු ලැබූ සම්පූර්ණ වශයෙන් සේවය කල එක් එක් වර්ෂය සඳහා මාස භාගයක (1/2) වැටුප හෝ වේතනයට සමාන මුදලක් පාරිතෝෂික වශයෙන් ගෙවිය යුතු බව දක්වා ඇත.
>
> 03. මේ අනුව ඔබගේ ලිපියේ සඳහන් සේවකයා සම්බන්ධයෙන් ද, පාරිතෝෂික ගෙවීමේ පනතේ ඉහත විධි විධාන අනුව කටයුතු කල යුතු වන අතර **අවසාන වරට ලැබූ වැටුපේ නිත්‍යානුකූලභාවය පරීක්ෂා කිරීම සම්බන්ධයෙන් පාරිතෝෂික ගෙවීමේ පනතේ විධිවිධාන යටතේ කම්කරු කොමසාරිස් වෙත බලයක් හිමිවී නොමැති බව කාරුණිකව දන්වා සිටිමි.**"

The question whether gratuity should be calculated at one month's salary or half months salary had arisen prior to the retirement of the 4th Respondent, with several other employees complaining to the Department of Labour. A meeting had accordingly been held between the officials of the Department of Labour, the Petitioner and the Unions on 3rd August 2016. According to the minutes of the meeting marked '**1R6A**', the discussion had centered on whether payment of gratuity over and above what has been stipulated by Section 6(2) of the Act is illegal, and the explanation of the Department of Labour that such payment is not illegal.

The Department of Labour had thereafter sought the views of the Department of Management Services, who had replied as follows by their letter dated 7th September 2016 marked '**1R4A**':

"රාජ්‍ය සංස්ථා, ව්‍යවස්ථාපිත මණ්ඩල සහ සම්පූර්ණයෙන් රජය සතු සමාගම්වල සේවක දිමනා සම්බන්ධයෙන් කළමනාකරණ සේවා දෙපාර්තමේන්තුවේ අනුමැතිය ලබා ගත යුතු නමුත්, එකී ලිපියෙහි සඳහන් පාරිතෝෂික ගෙවීම් සම්බන්ධයෙන්, 1983 අංක 12 දරන පාරිතෝෂික ගෙවීම් පනත අනුව කටයුතු කළ යුතු බව කාරුණිකව දන්වම්."

The Department of Labour had also considered whether the decision of the Petitioner taken in May 2016 – vide '**P16**'- to reduce the gratuity to half months pay for each year of completed service is illegal, and taken the view that the employer cannot unilaterally amend the terms and conditions of employment. The following passage in '**1R6B**' which is an internal letter dated 15th November 2016 explains the views of the Commissioner of Labour who conducted the inquiry:

"සේවායෝජකයෙකු සහ සේවකයෙකු අතර ලිඛිත, වාචික, අනුමිත සහ ගම්‍යමාන යන ආකාර ,වන ගිවිසුම් සේවායෝජකට සේවකයාගේ කැමැත්ත නොමැතිව ඒකපාක්ෂිකව අහෝසි කල නොහැකි බව විනිශ්චිත නඩු තීන්දු මගින් දක්වා ඇත. මේ ආකාරයෙන් අදාළ චක්‍රලේඛය මගින් සේවායෝජක කුරුණෑගල වැව්ලි සමාගම සහ එවකට සේවයේ යෙදි සිට සේවකයන් අතර ගිවිසුමක් ඇති වී ඇත. අදාළ ගිවිසුම ප්‍රකාරව එක් සේවක පිරිසකට වසරකට එක් මාසයක පාරිතෝෂික ලබා දී තවත් පිරිසකට එය අහිමි කිරීම මගින් ඔවුන්ට වෙනස් කොට සැලකීමක් සිදුවේ. එවැනි ආකාරයේ ගිවිසුමක් මගින් ලබාදුන් හිමිකමක් එම ගිවිසුම ඇති වන අවස්ථාවේදි සේවයේ යෙදි සිට සියලුම සේවකයන් සම්බන්ධව අදාළ වන අතර එම ගිවිසුම ඇතිවන අවස්ථාවට පසුව සේවයට බැඳෙන සේවකයන් සම්බන්ධයෙන් පමණක් වෙනත් ආකාරයේ ගිවිසුමකට එළඹීමට හැකිවේ."

A similar issue had arisen in **Seylan Bank vs Commissioner General of Labour and Others**.[5] In or about the year 2004 as an employee friendly measure, a decision had been taken by Seylan Bank to increase the statutorily mandated quantum stipulated by the Act, to a full months pay per each year of service for employees who have more than 10 years of unblemished service. Thereafter an internal memorandum had been issued to give effect to such decision. The

[5] CA(Writ) Application No. 891/2009; CA Minutes of 21st January 2015.

enhanced amounts in the manner indicated in the said Circular was adopted and paid. At the time the scheme was initiated, the petitioner was enjoying a profitable and financially successful period. However, by about December 2008 a financial crisis emerged within the Ceylinco Group, which affected the ability of the petitioner to continue to pay gratuity at the enhanced rate. As such the petitioner had reverted to the statutory half months pay, with the petitioner claiming that such a course of action is in the best interest of the petitioner and its employees.

A divisional bench of this Court had held as follows:

> "*When gratuity payable to an employee is higher than the statutory minimum, it is governed by any other agreement as in the case in hand. If it is so gratuity should be computed in accordance with such agreement, and the employer would be estopped from denying such benefit to an employee. The scheme of the Act contemplates in a broad sense two options. (a) The statutory minimum of ½ month salary for each, year of service. (b) An enhanced payment of gratuity based on any other agreement between the employer and employee. It could also be on a collective agreement or award. I observe that both (a) and (b) above fall within the four corners of the statute. To enter into 'any other agreement' is recognized by the payment of Gratuity Act itself and to provide for payment of enhanced gratuity. .... I would go further in this regard and state it is a 'right' of an employee and not a privilege. As such an employee or workman would have a legitimate expectation for payment of enhanced gratuity which cannot be exploited/denied by the employer, on any account. I cannot accept and agree with the views expressed contrary to above on behalf of the Petitioner Bank.*"

In the above circumstances, I am of the view that the 1st Respondent was right when he arrived at the finding in '**P25**' that the increase in gratuity granted by '**1R4B**' cannot be withdrawn unilaterally and that the 4th Respondent must be paid gratuity at the rate of one month's salary for each year of completed service. Therefore, I am of the view that the decision of the 1st Respondent in '**P25**' that the 4th Respondent should be paid gratuity in terms of '**1R4B**' is neither illegal nor *ultra vires* the powers of the 4th Respondent.

The final argument of the learned President's Counsel for the Petitioner was that in any event, the 4th Respondent had not completed 10 years of service and therefore is not entitled to the payment of gratuity in terms of '**1R4B**'. Quite apart from the fact that this argument had not been taken up before the Department of Labour, this argument fails to take into consideration the fact that the contract of employment evidenced by '**P5**' is in effect a continuation of the initial contract of employment granted by '**P4**' for the reason that (a) there has not been a break in employment between the two contracts; and (b) the duties entrusted to the 4th Respondent and the privileges that the 4th Respondent was entitled to, continued to remain the same.[6]

Before concluding, there are three matters that I must advert to. The first is that although the Petitioner claims that it has paid the 4th Respondent a salary over and above what it was authorized to pay in terms of the Circulars issued by the Department of Management Services, no steps have been taken to recover the purported excess payments from the 4th Respondent. The second is the fact that the Petitioner has already paid other employees referred to in the table marked '**P33**' gratuity in terms of '**1R4B**'. The third is the fact that at the time the Petitioner introduced the scheme for enhanced gratuity, it has

[6] See Bogawanthalawa Tea Estates PLC v. Commissioner General of Labour and Others [CA (Writ) Application No. 282/2018, CA Minutes of 20th December 2018] for a discussion on payment of gratuity under two different contracts of employment.

made financial provision to meet the extra expenditure that needs to be incurred to meet the said obligation.

In the above circumstances, I see no merit in this application. The application of the Petitioner is accordingly dismissed, without costs.

Judge of the Court of Appeal

Mahinda Samayawardhena, J

I agree

Judge of the Court of Appeal